No. 18-525	
Title:	**Fort Bend County, Texas, Petitioner** **v.** **Lois M. Davis**
Docketed:	October 19, 2018
Lower Ct:	United States Court of Appeals for the Fifth Circuit
Case Numbers:	(16-20640)
Decision Date:	June 20, 2018
Rehearing Denied:	July 20, 2018
Questions Presented	

DATE	**PROCEEDINGS AND ORDERS**
Oct 18 2018	Petition for a writ of certiorari filed. (Response due November 19, 2018) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
Nov 12 2018	Motion to extend the time to file a response from November 19, 2018 to December 19, 2018, submitted to The Clerk. **Main Document**
Nov 14 2018	Motion to extend the time to file a response is granted and the time is extended to and including December 19, 2018.
Dec 19 2018	Brief of respondent Lois Davis in opposition filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 21 2018	Letter waiving the 14-day waiting period under Rule 15.5 filed. **Main Document**
Dec 26 2018	DISTRIBUTED for Conference of 1/11/2019.
Dec 26 2018	Reply of petitioner Fort Bend County filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 11 2019	Petition GRANTED.
Jan 29 2019	Blanket Consent filed by Respondent, Lois Davis. **Blanket Consent**
Feb 04 2019	Blanket Consent filed by Petitioner, Fort Bend County.

	Blanket Consent
Feb 11 2019	SET FOR ARGUMENT on Monday, April 22, 2019
Feb 25 2019	Brief of petitioner Fort Bend County filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 25 2019	Joint appendix filed. **Main Document** **Proof of Service**
Feb 27 2019	Brief amicus curiae of Professor Scott Dodson in support of neither party filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 04 2019	Brief amici curiae of Center for Workplace Compliance, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 04 2019	Brief amici curiae of National Conference of State Legislatures, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 20 2019	CIRCULATED
Mar 21 2019	Record requested from the U.S.C.A. 5th Circuit.
Mar 27 2019	Brief of respondent Lois Davis filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 03 2019	Brief amicus curiae of NAACP Legal Defense & Educational Fund, Inc. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 03 2019	Brief amicus curiae of Constitutional Accountability Center filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 03 2019	Brief amicus curiae of United States filed. (Distributed) **Certificate of Word Count** **Main Document**
Apr 03 2019	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Apr 03 2019	Brief amici curiae of National Employment Lawyers Association and The Employee Rights Advocacy Institute for Law & Policy filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Apr 12 2019	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Apr 12 2019	Reply of petitioner Fort Bend County filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 22 2019	Argued. For petitioner: Colleen E. Roh Sinzdak, Washington, D. C. For respondent: Raffi Melkonian, Houston, Tex.; and Jonathan C. Bond, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)
Jun 03 2019	Adjudged to be AFFIRMED. Ginsburg, J., delivered the **opinion** for a unanimous Court.
Jul 05 2019	JUDGMENT ISSUED.

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No. 18-____

IN THE
Supreme Court of the United States

FORT BEND COUNTY,
Petitioner,

v.

LOIS M. DAVIS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, requires plaintiffs to exhaust claims of employment discrimination with the EEOC before filing suit in federal court. *Id.* § 2000e-5(b), (f)(1). The question presented is:

Whether Title VII's administrative exhaustion requirement is a jurisdictional prerequisite to suit, as three Circuits have held, or a waivable claim-processing rule, as eight Circuits have held.

PARTIES TO THE PROCEEDING

Fort Bend County, petitioner on review, was the defendant-appellee below.

Lois M. Davis, respondent on review, was the plaintiff-appellant below.

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IN THE

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No. 18-

FORT BEND COUNTY,
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v.

LOIS M. DAVIS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Fort Bend County respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion (Pet. App. 1a-15a) is reported at 893 F.3d 300. The District Court's opinion (Pet. App. 16a-38a) is not reported, and is available at 2016 WL 4479527. The Fifth's Circuit's order denying panel rehearing and rehearing en banc (Pet. App. 39a-40a) is not reported.

JURISDICTION

The Fifth Circuit entered judgment on June 20, 2018. Petitioner filed a timely petition for rehearing en banc, which was denied on July 20, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced at Pet. App. 41a-52a.

INTRODUCTION

Title VII of the Civil Rights Act of 1964 requires individuals complaining of employment discrimination to file a charge with the Equal Employment Opportunity Commission (EEOC) before proceeding to federal court. 42 U.S.C. § 2000e-5(b), (f). This exhaustion requirement ensures that the EEOC has an opportunity to investigate and resolve credible claims of discrimination before those claims give rise to litigation. And it guarantees employers fair notice of the charges against them, and a chance to remediate the discriminatory practices being complained of.

Nonetheless, the Circuits are intractably divided, 8-3, over whether courts may exercise jurisdiction over Title VII claims that plaintiffs *never* raised with the EEOC. Three Circuits—the Fourth, the Ninth, and the Eleventh—hold that Title VII's exhaustion requirement is jurisdictional, and that courts accordingly lack subject matter jurisdiction over claims that were never presented to the EEOC. Eight Circuits, however, disagree. They characterize the exhaustion requirement as a claim-processing rule that is subject to waiver, forfeiture, and other equitable defenses. Indeed, the Executive Branch *itself* is

internally divided on the question, with the Department of Justice describing Title VII's exhaustion requirement as jurisdictional, and the EEOC siding with those courts that take the opposite view.

This Court's intervention is badly needed. The Circuits' disagreement will not resolve itself; on the contrary, the circuit split has dramatically hardened in recent years, with two Circuits (the Fifth and the Tenth) taking a side in the last four months alone. Furthermore, the question presented is of "considerable practical importance," given the significant consequences that deeming a requirement jurisdictional has for litigants and courts alike. *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 434 (2011). And the view adopted by the majority of lower courts is incorrect: Title VII expressly refers to the exhaustion requirement in jurisdictional terms, and requires exhaustion to advance system-wide goals, not to protect case-specific interests that litigants should be free to waive.

This case is an ideal vehicle to resolve the split. Lois Davis sued Fort Bend County for religious discrimination despite the fact that Davis plainly never raised a charge of religious discrimination before the EEOC. The district court properly dismissed Davis's suit for lack of subject matter jurisdiction. But the Fifth Circuit reversed, holding that administrative exhaustion is not a jurisdictional prerequisite to suit, and that the County forfeited a failure-to-exhaust defense by raising it too late.

Three Circuits would have reached a different conclusion on these facts. And those courts have the better view of the law. The writ of certiorari should

be granted and the decision below should be reversed.

STATEMENT

1. Fort Bend County hired Lois Davis as an information technology supervisor in 2007. Pet. App. 17a n.2. In 2010, Davis informed the County's human resources department that the County's director of information technology had been sexually harassing her. *Id.* The County immediately placed Davis on leave, and conducted an investigation that led to the IT director's resignation three weeks later. *Id.*

In March 2011, Davis filed a charge of discrimination with the Texas Workforce Commission and the EEOC. *Id.* at 19a; *see* D. Ct. Dkt. 49-2, at 1, 27. Davis alleged both that she had been the subject of sexual harassment and that, after she complained to the human resources department, her supervisor had retaliated against her. D. Ct. Dkt. 49-2, at 9. In the "Discrimination Statement" section of her charge, Davis stated that "I believe I have been discriminated against *** because of my gender/sex, female, and in retaliation for my complaint of harassment." *Id.* Davis also checked boxes indicating that she was complaining of discrimination based on "Sex" and "Retaliation." *Id.* Davis did not claim any discrimination based on religion.

While Davis's EEOC charge was pending, the County completed preparations to relocate its offices to a new facility. Pet. App. 18a n.2. The final relocation was scheduled for the weekend of July 4, 2011, and the County told all technical support employees, including Davis, that they needed to be present to set up the County's computer system. *Id.* Davis refused to attend, citing a "previous religious commitment."

Id. After repeated warnings that failure to attend would result in disciplinary action, Davis did not appear for the scheduled move, and the County terminated her employment. *Id.*

Following her termination, Davis modified an "intake questionnaire" she had submitted to the Texas Workforce Commission alongside her charge of discrimination by handwriting the word "religion" next to a checklist labeled "Employment Harms or Actions." *Id.* at 19a-20a; *see* D. Ct. Dkt. 49-2, at 2, 17. Davis did not explain the meaning of this one-word notation or describe the events surrounding her termination. Pet. App. 32a-33a. She also did not amend her charge of discrimination.

In November 2011, the Texas Workforce Commission informed Davis that it had made a preliminary decision to dismiss her charge. *Id.* at 21a. The Commission explained that "it cannot be established that the employer has discriminated against you based on Sex, Retaliation, or any other reason prohibited by the laws we enforce." *Id.* The Workforce Commission and the U.S. Department of Justice subsequently sent Davis letters informing her that she had a right to sue under Title VII. *Id.*

2. In January 2012, Davis sued the County in the Southern District of Texas. As in her EEOC charge, Davis claimed that County employees violated Title VII by allegedly retaliating against her for complaining of sexual harassment. D. Ct. Dkt. 1, at 7-8. For the first time, Davis also claimed that the County engaged in religious discrimination by requiring

Davis to appear for work on Sunday, July 3, to assist in the relocation efforts. *Id.* at 6-7.[1]

Following discovery, the County moved for summary judgment on all counts. The District Court granted the motion, finding that each of Davis's claims failed on the merits. *Davis* v. *Fort Bend Cty.*, 2013 WL 5157191, at *7 (S.D. Tex. Sept. 11, 2013). The Fifth Circuit reversed in part. *Davis* v. *Fort Bend Cty.*, 765 F.3d 480, 491 (5th Cir. 2014). It found a "genuine dispute of material fact" as to whether the County had a sufficiently compelling reason for requiring Davis to work on Sunday. *Id.* at 489. Accordingly, it remanded the case for further consideration of her religious discrimination claim. *Id.* at 491. This Court denied certiorari. *Fort Bend Cty.* v. *Davis*, 135 S. Ct. 2804 (2015) (mem.).

3. On remand, Davis amended her complaint to substantially expand her claim of religious discrimination. D. Ct. Dkt. 39. The County moved to dismiss the claim, arguing that the district court lacked subject matter jurisdiction to consider this claim because Davis did not raise it in her EEOC charge. Pet. App. 21a-22a.

The District Court granted the motion to dismiss. *Id.* at 16a. It explained that "there is disagreement in this circuit" as to whether Title VII's administrative exhaustion requirement "is merely a prerequisite to suit, and thus subject to waiver and estoppel,

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[1] Davis also raised a claim of intentional infliction of emotional distress. The district court granted summary judgment against this claim, and Davis did not challenge that ruling on appeal. Pet. App. 2a-3a & n.1.

or whether it is a requirement that implicates subject matter jurisdiction." *Id.* at 24a (internal quotation marks omitted). The District Court found "more persuasive" the reasoning of those courts that deemed exhaustion "a jurisdictional bar to suit." *Id.* at 25a-26a. Accordingly, it explained, it was "irrelevant" that the County had not raised the question of exhaustion sooner, because "challenges to subject-matter jurisdiction can of course be raised at any time prior to final judgment." *Id.* at 27a n.7 (alterations and citation omitted).

The District Court further held that Davis failed to administratively exhaust her religious discrimination claim. *Id.* at 37a. Davis "d[id] not mention religious discrimination" in her charge of discrimination. *Id.* at 29a. And she did not sufficiently raise the charge by belatedly writing the single word "religion" on her intake questionnaire. Among other problems, an "intake questionnaire does not constitute a charge"; there is "no evidence that Defendant was aware of [the] amendment"; Davis "did not include any additional information" or "expla[nation]" alongside that solitary word; and—in light of the inadequacy of this amendment—the EEOC was not aware of and did not investigate any potential religious discrimination. *Id.* at 29a-34a. The District Court rejected Davis's argument that exhaustion "would have been futile," explaining that because "the exhaustion requirement is jurisdictional," it "cannot be excused by futility." *Id.* at 36a-37a.

4. A divided panel of the Fifth Circuit reversed. *Id.* at 1a.[2] Like the District Court, the panel majority observed that "[i]n our circuit, there is disagreement on whether Title VII's administrative exhaustion requirement is a jurisdictional requirement that implicates subject matter jurisdiction or merely a prerequisite to suit (and thus subject to waiver or estoppel)." *Id.* at 5a. Indeed, the panel observed that three different lines of Fifth Circuit cases pointed in three different directions. One line of cases "characterize[d] Title VII's administrative exhaustion requirement as jurisdictional." *Id.* at 6a. Another line of cases "treated Title VII's exhaustion requirement as merely a prerequisite to suit." *Id.* And yet "a *third* line of cases * * * acknowledge[d] an intra-circuit split but d[id] 'not take sides in this dispute.'" *Id.* at 7a. This division, unsurprisingly, "ha[d] caused confusion for district courts." *Id.*

The panel resolved the intra-circuit dispute by siding with those panels that concluded that "Title VII's administrative exhaustion requirement is not a jurisdictional bar to suit." *Id.* at 12a. The panel explained that this was the position taken by the earliest-in-time Fifth Circuit decision, which took precedence under the Circuit's "rule of orderliness." *Id.* at 8a-9a. Moreover, the panel reasoned, a contrary rule would be "out-of-step with the Supreme Court's approach in" *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006), given that the panel thought that "Title VII's administrative exhaustion requirement is not expressed in jurisdictional terms." Pet. App. 11a.

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[2] Judge Jones concurred in the result only.

The panel also noted that this conclusion was "consistent with" the holdings of a majority, but not all, of its sister circuits. *Id.* at 12a.

Consequently, the panel held that ""[f]ailure to exhaust is an affirmative defense that should be pleaded." *Id.* at 14a. Because the County did not raise its exhaustion defense until the case was remanded to the District Court, the panel found it "abundantly clear" that the County "forfeited its opportunity to assert this claim." *Id.* at 15a.

The Fifth Circuit denied panel rehearing and rehearing en banc. *Id.* at 39a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CLEAR CIRCUIT SPLIT ON THE QUESTION PRESENTED.

The Fifth Circuit's decision cements an intractable circuit split on a question of great importance: whether Title VII's requirement that plaintiffs exhaust claims before the EEOC is a jurisdictional prerequisite to suit. Now that the Fifth Circuit has taken a side on the issue, the split stands at 8-3: Three Circuits hold that Title VII's administrative exhaustion requirement is jurisdictional; eight Circuits hold that it is not; and only one Circuit, the Eighth, remains undecided. What is more, the Executive Branch *itself* is internally divided on this issue, with the Department of Justice and the EEOC taking diametrically opposing positions.

Numerous courts, including the panel below, have acknowledged this split of authority. *See, e.g.*, Pet. App. 12a; *Wilson* v. *MVM, Inc.*, 475 F.3d 166, 174 (3d Cir. 2007). And in recent years, it has only gotten worse, to the point that nearly every Court of Ap-

peals with jurisdiction over Title VII claims has now picked a side. It is time for the Court to grant certiorari and resolve this disagreement once and for all.

1. As the split now stands, three Circuits—the Fourth, Ninth, and Eleventh Circuits—hold that Title VII's administrative exhaustion requirement is jurisdictional.

a. The Fourth Circuit first adopted this position more than two decades ago. In *Davis* v. *North Carolina Department of Correction*, 48 F.3d 134 (4th Cir. 1995), the plaintiff attempted to raise a Title VII claim even though he "never had a charge properly pending before the EEOC." *Id.* at 140. The Fourth Circuit explained that "[b]efore a federal court may assume jurisdiction over a claim under Title VII, * * * a claimant must exhaust the administrative procedures enumerated in 42 U.S.C. § 2000e-5(b)." *Id.* at 137. Furthermore, it continued, because exhaustion "is a jurisdictional prerequisite," it "must be alleged in a plaintiff's complaint," not merely raised as an affirmative defense. *Id.* at 140. That meant that, "the federal district court had no jurisdiction over [the plaintiff's] claim," and it should properly have been dismissed for lack of jurisdiction. *Id.*

The Fourth Circuit has repeatedly reaffirmed this position in the decades since. *See, e.g.*, *Hentosh* v. *Old Dominion Univ.*, 767 F.3d 413, 416 (4th Cir. 2014) ("[A] failure by the plaintiff to exhaust administrative remedies concerning a Title VII claim deprives the federal courts of subject matter jurisdiction over the claim." (quoting *Jones* v. *Calvert Group, Ltd.*, 551 F.3d 297, 300 (4th Cir. 2009)). Furthermore, the Fourth Circuit has repeatedly applied this position to dismiss Title VII claims for lack of juris-

diction because they were not properly raised in an EEOC charge—even if the plaintiff filed an EEOC charge raising *other* claims of discrimination. *See, e.g.*, *Tonkin* v. *Shadow Mgmt., Inc.*, 605 F. App'x 194, 194-195 (4th Cir. 2015) (per curiam) (dismissing unexhausted retaliation claim even though the plaintiff filed an EEOC charge alleging pregnancy discrimination); *see also Ruffin* v. *Lockheed Martin Corp.*, 659 F. App'x 744, 746-747 (4th Cir. 2016) (per curiam); *Whitaker* v. *Nash Cty.*, 504 F. App'x 237, 240 (4th Cir. 2013) (per curiam).

b. The Ninth Circuit shares the same position. For many years Ninth Circuit panels were divided on this question: Some panels held that exhaustion before the EEOC was a jurisdictional requirement, *e.g. EEOC* v. *Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994), while others deemed it merely a waivable prerequisite to suit, *e.g. Stache* v. *Int'l Union of Bricklayers & Allied Craftsmen*, 852 F.2d 1231, 1233 (9th Cir. 1988).

In *Sommatino* v. *United States*, 255 F.3d 704 (9th Cir. 2001), the Ninth Circuit reconciled these lines of precedent and sided with the Fourth Circuit. It explained that, under its precedents, certain "administrative exhaustion requirements," such as the requirement to "file a *timely* EEOC administrative complaint," are "not jurisdictional," but rather "conditions precedent to filing an action which a defendant may waive or be estopped from asserting." *Id.* at 708 (emphasis added). "However," the court continued, "our case law also holds that substantial compliance with the presentment of discrimination complaints to an appropriate administrative agency *is* a jurisdictional prerequisite." *Id.* (emphasis in

original). Consequently, it held, "[t]he jurisdictional scope of a Title VII claimant's court action depends upon the scope of both the EEOC charge and the EEOC investigation," and "where a plaintiff has never presented a discrimination complaint to the [EEOC], * * * the district court does not have subject matter jurisdiction." *Id.*

The Ninth Circuit has consistently followed this rule since. Ninth Circuit panels have repeatedly held that they lack jurisdiction over Title VII claims that the plaintiff did not raise in an EEOC charge. *See, e.g.*, *Salas* v. *Indep. Elec. Contractors Inc.*, 603 F. App'x 607, 608 (9th Cir. 2015); *Robinson* v. *Geithner*, 359 F. App'x 726, 728 (9th Cir. 2009). And, consistent with the Ninth Circuit's characterization of this requirement as "jurisdictional," they have refused to excuse a plaintiff's failure to exhaust on the grounds of waiver, forfeiture, or other equitable defenses. *See, e.g.*, *Ziya* v. *Glob. Linguistic Sol.*, 645 F. App'x 573, 574 (9th Cir. 2016) (explaining that "[e]quitable remedies are unavailable in federal court when the record shows that no administrative filing was ever made" (quoting *Sommatino*, 255 F.3d at 710)).[3]

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[3] The panel below suggested that *Kraus* v. *Presidio Trust Facilities Division/Residential Management Branch*, 572 F.3d 1039 (9th Cir. 2009) held that Title VII exhaustion is non-jurisdictional. *See* Pet. App. 12a. The panel was mistaken. *Kraus* did not involve Title VII's exhaustion requirement at all; instead, it considered whether a *regulation* requiring that a plaintiff "initiate contact with an EEO Counselor within 45 days" of each alleged discriminatory act was jurisdictional. 572 F.3d at 1043. The Ninth Circuit held that this requirement was non-jurisdictional in large part because, as a regulation, it

c. The Eleventh Circuit has also "treated the administrative exhaustion requirement as a 'jurisdictional prerequisite to filing a Title VII action.'" *Peppers* v. *Cobb Cty.*, 835 F.3d 1289, 1296-97 (11th Cir. 2016) (quoting *Crawford* v. *Babbitt*, 186 F.3d 1322, 1326 (11th Cir. 1999)). Like the Ninth Circuit, the Eleventh Circuit for many years had lines of competing precedent on this question, with some panels describing the exhaustion requirement as jurisdictional, *Manning* v. *Carlin*, 786 F.2d 1108, 1109 (11th Cir. 1986), and others broadly characterizing "conditions precedent to filing a Title VII suit" as non-jurisdictional, *Jackson* v. *Seaboard Coast Line R.R. Co.*, 678 F.2d 992, 1003 (11th Cir. 1982). In its 1999 *Crawford* decision, however, the Eleventh Circuit clarified that a plaintiff "must pursue and exhaust her administrative remedies as *a jurisdictional prerequisite* to filing a Title VII action," and affirmed the jurisdictional dismissal of an unexhausted Title VII claim on that basis. 186 F.3d at 1326 (emphasis added).

Since then, Eleventh Circuit panels have uniformly "applied the exhaustion requirement to affirm dismissals for lack of subject matter jurisdiction." *Brown* v. *Snow*, 440 F.3d 1259, 1263 (11th Cir. 2006); *see Thomas* v. *Nicholson*, 263 F. App'x 814, 815 n.1 (11th Cir. 2008) (per curiam) ("It is well-settled that, as a jurisdictional prerequisite, a federal employee must timely exhaust administrative remedies prior to filing an employment discrimination suit under

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"d[id] not carry the full weight of statutory authority." *Id.* That holding had no bearing on the nature of Title VII's *statutory* exhaustion requirement.

Title VII."). Indeed, in 2006, the Eleventh Circuit expressly noted its disagreement with the Second Circuit on this question, explaining that whereas "[t]he Second Circuit [has] reasoned that administrative exhaustion is not jurisdictional, * * * our precedents say otherwise." *Brown*, 440 F.3d at 1264 (citing *Boos* v. *Runyon*, 201 F.3d 178, 181-182 (2d Cir. 2000)).

2. In contrast with the views of the Fourth, Ninth, and Eleventh Circuits, eight Circuits hold that administrative exhaustion is not a jurisdictional prerequisite to suit under Title VII.

The D.C. Circuit has held that a district court may permissibly consider the claim of a Title VII plaintiff who "ha[s] not filed a charge with the [EEOC]." *De Medina* v. *Reinhardt*, 686 F.2d 997, 1012 (D.C. Cir. 1982); *see also Artis* v. *Bernanke*, 630 F.3d 1031, 1034 n.4 (D.C. Cir. 2011) (stating that "Title VII's exhaustion requirements are not jurisdictional," and skipping over exhaustion issue to address the merits). The First and Second Circuits have similarly held that exhaustion "is nonjurisdictional, [and] thus subject to waiver, estoppel, and equitable tolling." *McKinnon* v. *Kwong Wah Rest.*, 83 F.3d 498, 505 (1st Cir. 1996); *Frederique-Alexandre* v. *Dep't of Nat. & Envtl. Res. of Puerto Rico*, 478 F.3d 433, 440 (1st Cir. 2007) ("[T]he exhaustion requirement is not a jurisdictional prerequisite, but rather is subject to waiver, estoppel, and equitable tolling."); *Fowlkes* v. *Ironworkers Local 40*, 790 F.3d 378, 385 (2d Cir. 2015) ("[T]he failure of a Title VII plaintiff to exhaust administrative remedies raises no jurisdictional bar to the claim proceeding in federal court.")

The same is true of the Third, Sixth, Seventh, and Tenth Circuits. Each of those courts has held that the exhaustion requirement may not be "characteriz[ed] . . . as jurisdictional." *Wilson*, 475 F.3d at 175; *Hill* v. *Nicholson*, 383 F. App'x 503, 508 (6th Cir. 2010) ("exhaustion is not a jurisdictional prerequisite"); *Gibson* v. *West*, 201 F.3d 990, 994 (7th Cir. 2000) ("as a general matter, the failure to exhaust administrative remedies is a precondition to bringing a Title VII claim in federal court, rather than a jurisdictional requirement"); *Lincoln* v. *BNSF Ry. Co.*, 900 F.3d 1166, 1185 (10th Cir. 2018) ("a plaintiff's failure to file an EEOC charge * * * does not bar a federal court from assuming jurisdiction over a claim").

In the decision below, the Fifth Circuit joined this side of the split, holding that "a Title VII plaintiff's failure to exhaust her administrative remedies is not a jurisdictional bar but rather a prudential prerequisite to suit." Pet. App. 7a, 9a. It then rejected the County's exhaustion defense solely on the ground that the County "forfeited its opportunity to assert this claim." *Id.* at 15a.

Now, only a single Circuit with jurisdiction over Title VII claims—the Eighth—has yet to pick a side on the question presented. And the Eight Circuit exhibits profound internal division on this question. One line of Eighth Circuit cases claims that it is "*well-settled* that exhaustion of administrative remedies is a jurisdictional prerequisite to a private civil action under Title VII." *Mohr* v. *Dustrol, Inc.*, 306 F.3d 636, 643 (8th Cir. 2002) (emphasis added), *abrogated on other grounds by Desert Palace, Inc.* v. *Costa*, 539 U.S. 90 (2003); *see Edwards* v. *Dep't of*

Army, 708 F.2d 1344, 1346 (8th Cir. 1983) (per curiam) ("It is well settled that administrative remedies must be fully exhausted before jurisdiction [over Title VII claims] vests in the federal courts."). Another, equally categorical line of precedents asserts that a plaintiff's "fail[ure] to exhaust her administrative remedies * * * does not impact our jurisdiction." *Rester* v. *Stephens Media, LLC*, 739 F.3d 1127, 1130 n.2 (8th Cir. 2014). Unsurprisingly, that has left district courts in the Eighth Circuit in a state of deep disarray, with plaintiffs facing different rules depending on which district judge they draw.[4] The only certainty is that, whichever way the Eighth Circuit ultimately holds, it will not eliminate the longstanding and deep division between the Circuits.

Nor is there any prospect that this circuit split will resolve itself. Indeed, in the wake of this Court's 2006 decision in *Arbaugh*, the most recent Supreme Court precedent regarding the EEOC's prerequisites to suit, the circuit split has merely hardened. For example, the Fourth Circuit expressly refused to alter its holding that the exhaustion requirement is jurisdictional, explaining that *Arbaugh* "d[id] not address exhaustion" at all. *Tonkin*, 605 F. App'x at 195. And the Ninth and Eleventh Circuits have

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[4] *Compare Wilkie* v. *Dep't of Health & Human Servs.*, 2010 WL 1257927, at *8 (D.N.D. Mar. 26, 2010) (dismissing claim for "lack[] [of] subject matter jurisdiction" because the plaintiff "failed to exhaust her available administrative remedies"), *aff'd*, 638 F.3d 944 (8th Cir. 2011), *with Stadther* v. *Dep't of Homeland Sec.*, 2012 WL 4372570, at *7 (D. Minn. Aug. 7, 2012) ("Exhaustion of administrative remedies is not a jurisdictional requirement for a Title VII claim."), *report and recommendation adopted*, 2012 WL 4372567 (D. Minn. Sept. 25, 2012).

similarly reaffirmed their allegiance to this side of the split. *See, eg.*, *Salas*, 603 F. App'x at 608 (2015 decision reiterating Ninth Circuit's conclusion that exhaustion is jurisdictional); *Thomas*, 263 F. App'x at 815 n.1 (2008 decision noting that it is "well-settled" that exhaustion is a jurisdictional requirement in the Eleventh Circuit). By contrast, courts on the other side have viewed *Arbaugh* as support for the proposition that exhaustion may be waived, providing further evidence that the split is likely to endure without this Court's intervention. *See, e.g.*, Pet. App. 11a (asserting that *Arbaugh* suggests that exhaustion is non-jurisdictional); *Hill*, 383 F. App'x at 508 (relying on *Arbaugh* for the proposition that "exhaustion is not a jurisdictional prerequisite").

Moreover, the courts of appeals have struggled to achieve consensus on this issue even within a single circuit. As noted, both the Ninth and Eleventh Circuits reached the conclusion that exhaustion is jurisdictional in cases that resolved prior competing panel decisions on the issue. *See supra* pp. 11-13. Courts on the other side of the split have faced similar predicaments. In the decision below, the Fifth Circuit was forced to decide between *three* competing strands of Fifth Circuit precedent. Pet. App. 6a-7a. And the Second, Sixth, and Seventh Circuits were similarly forced to confront contrasting lines of precedent before holding that the exhaustion requirement may be waived. *See Fowlkes*, 790 F.3d at 385 (resolving the disagreement between competing Second Circuit precedents); *Hill*, 383 F. App'x at 508 (describing disparate Sixth Circuit decisions); *Gibson*, 201 F.3d at 994 ("clear[ing] up the confusion" for the Seventh Circuit). Meanwhile, the Eighth Circuit's internal disagreement is still unresolved.

See supra pp. 15-16. This quantity of intracircuit division indicates a level of confusion on the question that will abate only through this Court's intervention.

3. On top of the Circuits' disagreement, the Executive Branch itself is intractably divided on the question presented. Two federal agencies have responsibility for litigating Title VII claims—the Department of Justice and the EEOC, *see* 42 U.S.C. §§ 2000e-5(f)(1), 2000e-6—and they have taken diametrically opposite positions on the issue at hand.

The Department of Justice, for its part, sides with the three Circuits that hold that administrative exhaustion is a jurisdictional prerequisite to a Title VII suit. In 1999, the Solicitor General flatly told this Court that "[i]f a federal employee fails to exhaust the administrative process, the district court *has no jurisdiction* over the employee's Title VII claims." Br. in Opposition 8-9, *Barnes* v. *Levitt*, No. 97-1354 (U.S. Apr. 20, 1998), 1998 WL 34111957, at *8-9 (emphasis added). The Department of Justice has taken the same position in Court of Appeals briefs filed on both sides of the circuit split, arguing that "[w]hile the *timeliness* of exhaustion is not jurisdictional, a failure to file an administrative charge at all is a jurisdictional bar to filing suit under Title VII." Br. for Appellees U.S. Marshals Serv. et al. 45, *Barkley* v. *U.S. Marshals Serv.*, No. 12-5306 (D.C. Cir. Jan. 10, 2014), 2014 WL 97352, at *45 (emphasis in original).[5]

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[5] *See also* Br. for Federal Appellees 31, *Wilson*, 475 F.3d 166 (No. 05-3204), 2006 WL 5155872, at *31; Br. for Appellees 19 & n.11, *Ferren* v. *Norton*, No. 03-35811 (9th Cir. Dec. 29, 2003),

The EEOC takes the contrary view. For over a decade, it has argued that courts on the short side of the split are "incorrect that exhaustion of administrative remedies is a jurisdictional prerequisite to suit under Title VII." Br. of EEOC as *Amicus Curiae* 8 n.2, *Jones* v. *Needham*, No. 16-6156 (10th Cir. Oct. 4, 2016), 2016 WL 5869486, at *8 n.2.[6] Furthermore, last year, the EEOC successfully persuaded the Tenth Circuit to overturn its contrary precedents, and hold that "exhaustion of administrative remedies is not a jurisdictional prerequisite to suit" under Title VII or the Americans with Disabilities Act. Br. of EEOC as *Amicus Curiae* 8-13, *Lincoln*, 900 F.3d 1166 (No. 17-3120), 2017 WL 4349417, at *8-13; *see Lincoln*, 900 F.3d at 1184-85.

* * *

In short, the Circuits and the Executive Branch are deeply divided on the question presented. That means that a plaintiff's ability to skip the EEOC process and go straight to court varies depending on which jurisdiction she files her claim in. And the likelihood that the Federal Government will weigh in on her side depends on which agency happens to have jurisdiction over her particular grievance. This

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2003 WL 25656148, at *19 & n.11; Br. for Appellee 11 & n.6, *Wells* v. *Peters*, No. 99-11079 (11th Cir. Oct. 19, 1999), 1999 WL 33645665, at *11 & n.6.

[6] *See also* Br. for EEOC as *Amicus Curiae* 15 n.6, *Shikles* v. *Sprint/United Mgmt. Co.*, No. 03-3326 (10th Cir. Mar. 12, 2004), 2004 WL 3770077, at *15 n.6; Br. of EEOC as *Amicus Curiae* 7 n.3, *Holland* v. *Project Return Found.*, No. 99-7084 (2d Cir. Mar. 25, 1999), 1999 WL 33630777, at *7 n.3.

untenable situation requires this Court's intervention.

II. THE FIFTH CIRCUIT'S DECISION IS WRONG.

The Court should also grant certiorari because the position taken by the Fifth Circuit panel and the majority of Circuits is wrong. Under this Court's precedents, the requirement to raise a claim before the EEOC is properly deemed jurisdictional—indeed, this Court's precedents have repeatedly characterized it as such.

The plain text of Title VII makes federal jurisdiction contingent on the existence of an EEOC charge. It provides that, once the EEOC and the Attorney General decline to act on a charge of discrimination, "a civil action may be brought *against the respondent named in the charge * * * by the person claiming to be aggrieved.*" 42 U.S.C. § 2000e-5(f)(1) (emphasis added). This text refers to the exhaustion requirement in "jurisdictional language," *Patchak* v. *Zinke*, 138 S. Ct. 897, 905 (2018): It limits the circumstances in which an "action" may be "brought." That language is "similar to other statutes that this Court has deemed jurisdictional." *Id.* (finding that a statute "uses jurisdictional language" because it limits the circumstances in which "an 'action'" may be "'filed or maintained,'" and giving similar examples). A similar result is warranted here.

In fact, this Court has "long interpreted" Title VII's exhaustion requirement just that way. *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 134 (2008). In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), the Court stated that exhaustion is one of the "jurisdictional prerequisites to a

federal action" under Title VII. *Id.* at 798. Likewise, in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), the Court stated that Title VII "specifies with precision the *jurisdictional prerequisites* that an individual must satisfy before he is entitled to institute a lawsuit," and that these include "receiv[ing] and act[ing] upon the Commission's statutory notice of the right to sue." *Id.* at 47 (emphasis added). These rulings, issued close in time to the enactment of Title VII, are entitled to considerable weight in understanding its meaning. And they gain added weight from the fact that they have been "left undisturbed by Congress" despite Congress's repeated amendments to the very statutory provision at issue. *United States* v. *Kwai Fun Wong*, 135 S. Ct. 1625, 1642 (2015); *see* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5; Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 107, 112-113, 105 Stat. 1071, 1075, 1078-79.

This conclusion is reinforced by other indicia that the exhaustion requirement is jurisdictional. Administrative exhaustion before the EEOC is not designed to "protect a defendant's case-specific interest[s]," but rather "to achieve a broader system-related goal," *John R. Sand & Gravel Co.*, 552 U.S. at 133—namely, ensuring that the EEOC and the Department of Justice have an opportunity to investigate and resolve claims on their own, before the parties litigate the dispute in federal court. It would thus make little sense to permit parties to agree to waive this requirement, and unilaterally cut the relevant federal agencies out of the process. Furthermore, the statute's exhaustion requirement contains no exceptions. That is generally a sign that Congress considers a requirement jurisdictional, *see Reed Elsevier* v.

Muchnick, 559 U.S. 154, 166 (2010), and is particularly notable here given this Court's longstanding rule that it "will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." *Booth* v. *Churner*, 532 U.S. 731, 741 n.6 (2001); *see also McCarthy* v. *Madigan*, 503 U.S. 140, 144 (1992).

Nor do *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), and *Arbaugh* warrant a contrary conclusion. *Zipes* held that "the statutory *time limit* for filing charges under Title VII" is not jurisdictional. 455 U.S. at 387 (emphasis added). That, however, was because the statute's jurisdiction-conferring provision "contains no reference to the timely-filing requirement" and the statute's legislative history describes it as an ordinary statute of limitations. *Id.* at 393-395. The same is not true of the exhaustion requirement, which is expressly incorporated into the statute's "jurisdictional language," has for decades been understood by this Court to be jurisdictional, and—unlike a statute of limitations—is not a "quintessential claim-processing rule[]." *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013).

Arbaugh is even further afield. That case involved the question whether Title VII's definition of "employer" is jurisdictional. 546 U.S. at 503. By its terms, that requirement plainly describes an "element of a [federal] claim for relief." *Id.* at 516. And it contains no language or contextual evidence whatever suggesting that it is jurisdictional in nature.

III. THE QUESTION PRESENTED IS IMPORTANT.

This question is profoundly important. The Court has repeatedly noted the "considerable practical

importance" of whether a procedural rule ranks as "jurisdictional," given that jurisdictional requirements cannot be forfeited by litigants or overlooked by courts. *Henderson*, 562 U.S. at 434. Accordingly, the Court has repeatedly granted certiorari in recent years to resolve splits of authority regarding the jurisdictional status of procedural requirements. *See id.* (listing examples); *see also Kwai Fun Wong*, 135 S. Ct. at 1630; *Sebelius*, 568 U.S. at 152-153; *Gonzalez* v. *Thaler*, 565 U.S. 134, 139-140 (2012); *Union Pac. R.R. Co.* v. *Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 71, 75 (2009); *Arbaugh*, 546 U.S. at 509; *Scarborough* v. *Principi*, 541 U.S. 401, 412 (2004); *Kontrick* v. *Ryan*, 540 U.S. 443, 452 (2004).

This case, moreover, involves an uncommonly important statutory requirement. Roughly 60,000 charges are filed with the EEOC each year that raise claims under Title VII. EEOC, *Title VII of the Civil Rights Act of 1964 Charges*, https://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm (last visited Oct. 18, 2018). If the exhaustion requirement were non-jurisdictional, many of those plaintiffs could bring their claims directly to court, flooding the federal courts with additional employment litigation. And as the enormous number of circuit cases addressing this question makes clear, the question of whether exhaustion is jurisdictional has substantial practical effects for litigants already. *See supra* pp. 10-18.

Further, this case presents an ideal vehicle to resolve this issue. There is no serious question that Davis failed to present her religious-discrimination claim to the EEOC. Her only arguable reference to

that claim before the EEOC was the handwritten word "religion" on her intake questionnaire, added without explanation months after Davis's charge was filed. Pet. App. 19a. As the District Court found, that inscrutable amendment to the wrong document could not possibly place the EEOC on notice of the religious discrimination claim that Davis ultimately chose to bring. *Id.* at 29a-34a.

Consequently, the question presented is dispositive. If exhaustion goes to the court's subject-matter jurisdiction, Davis's suit must be dismissed. But if it does not, the County has forfeited any exhaustion defense by failing to raise it until Davis's case was remanded to the District Court. This case thus presents a clean opportunity for the Court at least to resolve an issue the Circuits have struggled with for decades.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20640

LOIS M. DAVIS,
Plaintiff-Appellant,

v.

FORT BEND COUNTY,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

Filed June 20, 2018

Before KING, JONES,* AND ELROD, Circuit Judges.

JENNIFER WALKER ELROD, Circuit Judge:

Once again Lois Davis appeals the district court's dismissal of her lawsuit against her former employer, Fort Bend County. We previously reversed and remanded, and we do so again today.

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* Concurring in the judgment only.

I.

Lois Davis was an information technology supervisor for Fort Bend County. Davis filed a complaint with Fort Bend's Human Resources Department alleging that the information technology director had sexually harassed and assaulted her. Fort Bend's own investigation led to the director's eventual resignation. According to Davis, her supervisor began retaliating against her because Davis had made a formal complaint against the director, who was a personal friend of her supervisor. When Davis informed her supervisor that she could not work one specific Sunday because she had a "previous religious commitment" to attend a special church service, her supervisor did not approve the absence. After Davis attended the church service and did not report to work, Fort Bend terminated her employment.

Alleging sexual harassment and retaliation by Fort Bend, she submitted an intake questionnaire and filed a charge with the Texas Workforce Commission. While her case was still pending before the Texas Workforce Commission, she amended her intake questionnaire to include religious discrimination but did not amend her charge. Specifically, she added the word "religion" in the box labeled "Employment Harms or Actions."

After the Texas Workforce Commission issued a right-to-sue letter, Davis filed her lawsuit in district court. She alleged both retaliation and religious discrimination under Title VII and intentional infliction of emotional distress. The district court

granted summary judgment on all claims, and Davis timely appealed.

In her first appeal, Davis argued that the district court erred when it granted summary judgment for Fort Bend, and we affirmed summary judgment on her retaliation claim but reversed on her religious discrimination claim. [1] *See Davis v. Fort Bend County*, 765 F.3d 480, 491 (5th Cir. 2014), *cert denied*, 135 S. Ct. 2804 (2015). On the religious discrimination claim, we held that genuine disputes of material fact existed as to whether: (1) Davis held a bona fide religious belief that she needed to attend the Sunday service; and (2) Fort Bend would have suffered an undue hardship in accommodating Davis's religious observance. *Id.* at 487, 489. Fort Bend filed a petition for writ of certiorari challenging this determination, and the Court denied it.

On remand, Fort Bend argued to the district court—for the first time—that Davis had failed to exhaust her administrative remedies on her religious discrimination claim. Agreeing with Fort Bend, the district court held that administrative exhaustion is a jurisdictional prerequisite in Title VII cases. Thus, the district court reasoned, Davis's contention that Fort Bend had waived this argument was "irrelevant." It determined that Davis had failed to exhaust her administrative remedies. Accordingly, the district court dismissed with prejudice Davis's religious discrimination claim.

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[1] Davis did not challenge the grant of summary judgment on her intentional infliction of emotional distress claim. *See Davis v. Fort Bend County*, 765 F.3d 480, 484 (5th Cir. 2014), *cert denied*, 135 S. Ct. 2804 (2015).

On appeal, Davis argues that failure to exhaust administrative remedies under Title VII is not a jurisdictional bar to suit. Rather, administrative exhaustion is only a prudential prerequisite for suit, and Fort Bend has waived any exhaustion argument. In the alternative, Davis raises two other arguments: (1) that she did exhaust her administrative remedies; and (2) that requiring her to exhaust further would have been futile.

II.

A.

We review questions of subject matter jurisdiction *de novo*. *See Nat'l Football League Players Ass'n v. Nat'l Football League*, 874 F.3d 222, 225 (5th Cir. 2017). We also review *de novo* a district court's determination that a plaintiff did not exhaust her administrative remedies. *Ruiz v. Brennan*, 851 F.3d 464, 468 (5th Cir. 2017).

III.

Title VII of the Civil Rights Act provides for private causes of action arising out of employment discrimination and gives federal courts subject matter jurisdiction to resolve such disputes. *See* 42 U.S.C. § 2000e-5(f). Before seeking judicial relief, however, Title VII plaintiffs are required to exhaust their administrative remedies by filing a charge of discrimination with the Equal Employment Opportunity Commission within 180 days of the alleged discrimination. 42 U.S.C. § 2000e-5(e)(1).[2]

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[2] 42 U.S.C. §2000e-5(e)(1) reads:

"[A] primary purpose of Title VII is to trigger the investigatory and conciliatory procedures of the EEOC, in attempt to achieve non-judicial resolution of employment discrimination claims." *Pacheco v. Mineta*, 448 F.3d 783, 788–89 (5th Cir. 2006). By exhausting their administrative remedies by filing formal charges with the EEOC, Title VII plaintiffs initiate this process. In our circuit, there is disagreement on whether Title VII's administrative exhaustion requirement is a jurisdictional requirement that implicates subject matter jurisdiction or merely a prerequisite to suit (and thus subject to waiver or estoppel). *See id.* at 788 n.7.

"Jurisdiction . . . is a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)). Cautioning against the "profligate" use of the term,

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(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

the Supreme Court has admitted that it and other courts have been "less than meticulous" when using this word in the past. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510–11 (2006). We must be careful to distinguish between jurisdictional requirements that bear on a court's power to adjudicate a case and nonjurisdictional requirements.

We have a line of cases that characterize Title VII's administrative exhaustion requirement as jurisdictional. *See, e.g.*, *Randel v. U.S. Dep't of Navy*, 157 F.3d 392, 395 (5th Cir. 1998) ("If the claimant fails to comply with either of these [Title VII] requirements then the court is deprived of jurisdiction over the case."); *Nat'l Ass'n of Gov't Emps. v. City Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 711 (5th Cir. 1994) ("It is well-settled that courts have no jurisdiction to consider Title VII claims as to which the aggrieved party has not exhausted administrative remedies."); *Tolbert v. United States*, 916 F.2d 245, 247 (5th Cir. 1990) ("Failure to comply with [Title VII's administrative exhaustion requirement] wholly deprives the district court of jurisdiction over the case.").

On the other hand, we have also treated Title VII's exhaustion requirement as merely a prerequisite to suit. *See, e.g.*, *Young v. City of Hous.*, 906 F.2d 177, 180 (5th Cir. 1990) ("A failure of the EEOC prerequisite does not rob a court of jurisdiction."); *Womble v. Bhangu*, 864 F.2d 1212, 1213 (5th Cir. 1989) ("In holding that the failure of [the plaintiff] to exhaust administrative remedies deprived it of subject matter jurisdiction, the court erred."); *Fellows v. Universal Rests., Inc.*, 701 F.2d 447, 449 (5th Cir. 1983) (acknowledging that Title VII's

requirements are "not necessarily 'jurisdictional'"); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460 (5th Cir. 1970) (noting that "the filing of a charge of discrimination with the EEOC is a condition precedent to the bringing of a civil action under Title VII").

In fact, there is a *third* line of cases. These more recent cases acknowledge an intra-circuit split but do "not take sides in this dispute." *Pacheco*, 448 F.3d at 788 n.7; *see, e.g.*, *Ruiz*, 851 F.3d at 472 ("Because neither party is arguing waiver or estoppel, and because the outcome would remain the same whether we consider exhaustion to be a condition precedent or a jurisdictional prerequisite, 'we need not take sides in this dispute.'" (quoting *Pacheco*, 448 F.3d at 788 n.7)); *Sapp v. Porter*, 413 F. App'x 750, 752 (5th Cir. 2011) ("We decline to address this disagreement because the facts of this case do not implicate any of the equitable doctrines of relief."); *Devaughn v. U.S. Postal Serv.*, 293 F. App'x 276, 281 (5th Cir. 2008) (deciding not to settle "whether a failure to exhaust Title VII administrative remedies is a jurisdictional requirement or a prerequisite to suit").

This has caused confusion for district courts. *See, e.g.*, *Muoneke v. Prairie View A&M Univ.*, No. H-15-2212, 2016 WL 3017157, at *6 n.2 (S.D. Tex. May 26, 2016) (noting that "[w]hat appears to be the most recent Fifth Circuit case addressing this issue makes clear that the failure to administratively exhaust is viewed as a jurisdictional bar to suit" (citing *Simmons-Myers v. Caesars Entm't Corp.*, 515 F. App'x 269, 272 (5th Cir. 2013))); *Ruiz v. Brennan*, No. 3:11-cv-02072-BH, slip op. at 10 (N.D. Tex. June 8,

2016) (magistrate judge order) (noting that "[d]ifferent Fifth Circuit panels have reached differing conclusions" on the issue of whether Title VII exhaustion is jurisdictional and conducting a rule-of-orderliness analysis).

Recently, we held that *Womble* and *Young* control under our rule of orderliness, so "the exhaustion requirement under Title VII is not jurisdictional." *Davenport v. Edward D. Jones & Co., L.P.*, 891 F.3d 162, 169 (5th Cir. 2018). We explained that *Arbaugh* "strongly suggests" that *Womble* "reached the correct result" because of the bright-line rule that *Arbaugh* announces. *Id.* at 169 n.19.[3]

Under our rule of orderliness, "one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court." *Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016) (quoting *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008)); *see also Arnold v. U.S. Dep't of Interior*, 213 F.3d 193, 196 n.4 (5th Cir. 2000) ("[T]o the extent that a more recent case contradicts an older case, the newer language has no effect."). Our earliest case, *Womble*, determined that Title VII's administrative exhaustion requirement is not jurisdictional. 864 F.2d at 1213. In *Womble*, we held that the district court erred "[i]n holding that the failure of [the Title VII plaintiff] to exhaust administrative remedies deprived it of subject matter jurisdiction." 864 F.2d

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[3] *Davenport* was originally issued on May 16, 2018 as an unpublished opinion. Later, on May 22, 2018, it was reissued as published opinion.

at 1213. The *Womble* plaintiff failed to file a Title VII charge with the EEOC before bringing her lawsuit in district court. *Id.* We held that her claim "was barred," but the district court had jurisdiction over it. *Id.* Under the rule of orderliness, we are bound by *Womble*'s holding that a Title VII plaintiff's failure to exhaust her administrative remedies is not a jurisdictional bar but rather a prudential prerequisite to suit.[4]

Some Fifth Circuit cases cite to *Tolbert v. United States*, 916 F.2d 245 (5th Cir. 1990), for the proposition that Title VII's administrative exhaustion requirement is a jurisdictional requirement. *Tolbert* declares that "it is the well-settled law of this circuit that [Title VII's administrative exhaustion requirement] is a prerequisite to federal subject matter jurisdiction." 916 F.2d at 247. Even though our cases may rely on *Tolbert* for the proposition that Title VII's administrative exhaustion requirement is a jurisdictional requirement, under our rule of orderliness, *Womble* controls.

Moreover, the Supreme Court's decision in *Arbaugh* is instructive. *Arbaugh* held that Title VII's statutory limitation of covered employers—to those with 15 or more employees—is not a jurisdictional limitation. 546 U.S. at 516. The Court articulated a

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[4] In an even earlier case, on the issue of receipt of a right-to-sue letter, we held that this specific Title VII requirement is "a condition precedent to a Title VII claim rather than a jurisdictional prerequisite." *Pinkard v. Pullman-Standard, a Div. of Pullman, Inc*, 678 F.2d 1211, 1215 (5th Cir. Unit B 1982).

"readily administrable bright line" for courts and litigants to determine whether a statutory requirement is jurisdictional. *Id.* The Court explained:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue . . . . But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Id. at 515–16 (internal citation omitted) (footnote omitted).

Here, Congress did not suggest—much less clearly state—that Title VII's administrative exhaustion requirement is jurisdictional, and so we must treat this requirement as nonjurisdictional in character. See 42 U.S.C. § 2000e-5. The statute says nothing about a connection between the EEOC enforcement process and the power of a court to hear a Title VII case. In other statutes, by contrast, "Congress has exercised its prerogative to restrict the subject-matter jurisdiction of federal district courts based on a wide variety of factors . . . ." *Arbaugh*, 546 U.S. at 515 n.11. For example:

> Certain statutes confer subject-matter jurisdiction only for actions brought by specific plaintiffs, *e.g.*, 28 U.S.C. § 1345 (United States and its agencies and officers); 49 U.S.C. § 24301(l)(2) (Amtrak), or for claims against

> particular defendants, *e.g.*, 7 U.S.C. § 2707(e)(3) (persons subject to orders of the Egg Board); 28 U.S.C. § 1348 (national banking associations), or for actions in which the amount in controversy exceeds, *e.g.*, 16 U.S.C. § 814, or falls below, *e.g.*, 22 U.S.C. § 6713(a)(1)(B); 28 U.S.C. § 1346(a)(2), a stated amount.

Id. Title VII's administrative exhaustion requirement is not expressed in jurisdictional terms in the statute, *see* 42 U.S.C. § 2000e-5, and just as in *Arbaugh*, there is nothing in the statute to suggest that Congress intended for this requirement to be jurisdictional.

Tolbert is out-of-step with the Supreme Court's approach in *Arbaugh*. There, we said that Title VII's exhaustion requirement was jurisdictional and endorsed the Third Circuit's reasoning that "[a]bsent an indication of contrary congressional intent, we will not countenance circumventing the administrative process" by allowing a plaintiff to file a lawsuit before exhausting her administrative remedies. *Tolbert*, 916 F.2d at 249 n.1 (quoting *Purtill v. Harris*, 658 F.2d 134, 138 (3d Cir. 1981)). However, *Arbaugh* directs us to apply precisely the opposite presumption: "A rule is jurisdictional 'if the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional.'" *Gonzalez v. Thaler*, 565 U.S. 134, 141–42 (2012) (quoting *Arbaugh*, 546 U.S. at 515) (emphasis added); *see also United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) ("In recent years, we have repeatedly held that procedural rules . . . cabin a court's power only if Congress has 'clearly stated' as

much." (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013))). Accordingly, today, we reaffirm our earlier holding in *Womble* that Title VII's administrative exhaustion requirement is not a jurisdictional bar to suit.

This holding that Title VII's exhaustion requirement is not jurisdictional is consistent with the First, Second, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits. *See Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 385 (2d Cir. 2015) (acknowledging imprecise language in its own case law and clarifying that "the failure of a Title VII plaintiff to exhaust administrative remedies raises no jurisdictional bar to the claim proceeding in federal court"); *Adamov v. U.S. Bank Nat'l Ass'n*, 726 F.3d 851, 855–57 (6th Cir. 2013) (concluding that "the question of administrative exhaustion is nonjurisdictional"); *Williams v. Target Stores*, 479 F. App'x 26, 28 (8th Cir. 2012) (noting that failure to exhaust administrative remedies is not a jurisdictional prerequisite under Title VII); *Vera v. McHugh*, 622 F.3d 17, 29–30 (1st Cir. 2010) ("Although typically a failure to exhaust administrative remedies will bar suit in federal court, 'the exhaustion requirement is not a jurisdictional prerequisite' to filing a Title VII claim in federal court." (quoting *Frederique-Alexandre v. Dep't of Nat'l & Envtl. Res.*, 478 F.3d 433, 440 (1st Cir. 2007))); *Kraus v. Presidio Tr. Facilities Div./Residential Mgmt. Branch*, 572 F.3d 1039, 1043 (9th Cir. 2009) (concluding that Title VII's exhaustion requirement is not a jurisdictional prerequisite for suit); *Douglas v. Donovan*, 559 F.3d 549, 556 n.4 (D.C. Cir. 2009) ("[T]he exhaustion requirement, though mandatory, is not jurisdictional

. . . ."); *Gibson v. West*, 201 F.3d 990, 994 (7th Cir. 2000) (overruling circuit precedent and holding "that, as a general matter, the failure to exhaust administrative remedies is a precondition to bringing a Title VII claim in federal court, rather than a jurisdictional requirement"); *but see Logsdon v. Turbines, Inc.*, 399 F. App'x 376, 379 n.2 (10th Cir. 2010) (noting that in the Tenth Circuit "EEOC exhaustion is still considered jurisdictional" even if undermined by recent Supreme Court cases (quoting *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993))); *Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 300 (4th Cir. 2009) ("[A] failure by the plaintiff to exhaust administrative remedies concerning a Title VII claim deprives the federal courts of subject matter jurisdiction over the claim.").

B.

We now turn to the issue of whether Fort Bend has forfeited its opportunity to raise Davis's alleged failure to exhaust. Just because Title VII's administrative exhaustion requirement is not jurisdictional does not mean that this requirement should be ignored. "The purpose of this exhaustion doctrine is to facilitate the administrative agency's investigation and conciliatory functions and to recognize its role as primary enforcer of anti-discrimination laws." *Filer v. Donley*, 690 F.3d 643, 647 (5th Cir. 2012). Administrative exhaustion is important because it provides an opportunity for voluntary compliance before a civil action is instituted. For this reason, Title VII requires administrative exhaustion.

Failure to exhaust is an affirmative defense that should be pleaded. *See Flagg v. Stryker Corp.*, 819 F.3d 132, 142 (5th Cir. 2016) (en banc) (Haynes, J., concurring) ("Absent a jurisdictional nature to 'failure to exhaust,' we treat such failures to exhaust as affirmative defenses, not jurisdictional prerequisites."); *Carbe v. Lappin*, 492 F.3d 325, 328 (5th Cir. 2007) (noting that in PLRA cases, "[a]ny failure to exhaust must be asserted by the defendant").

Fort Bend did not raise the issue of administrative exhaustion in the district court originally. Davis's complaint alleged that "[a]ll conditions precedent" to suit had been met, but Fort Bend's answer only stated that Fort Bend did not have "sufficient knowledge or information, after reasonable inquiry, to admit or deny" the claim of jurisdiction. *See F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir. 1994) ("As we have held, if a litigant desires to preserve an argument for appeal, the litigant must press and not merely intimate the argument during the proceedings before the district court."). In its original motion for summary judgment, Fort Bend did not argue that Davis failed to exhaust her administrative remedies. Then, when Davis appealed for the first time, Fort Bend did not argue to us, in its briefing or during oral argument, that Davis failed to exhaust her administrative remedies. Nor did it raise the issue in its petition for rehearing *en banc* or in its petition for certiorari to the Supreme Court.

Simply put, Fort Bend waited five years and an entire round of appeals all the way to the Supreme Court before it argued that Davis failed to exhaust.

On these facts, it is abundantly clear that Fort Bend has forfeited its opportunity to assert this claim.[5] Accordingly, the district court erred in dismissing this case based on Davis's alleged failure to exhaust.

IV.

Title VII's administrative exhaustion requirement is not a jurisdictional bar to suit but rather a prudential prerequisite under our binding precedent, and Fort Bend forfeited its exhaustion argument by not raising it in a timely manner before the district court. For these reasons, we REVERSE and REMAND for further proceedings consistent with this opinion.

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[5] In light of our holdings that Title VII's administrative exhaustion requirement is not jurisdictional and that Fort Bend forfeited its argument that Davis failed to exhaust her administrative remedies as to her religious discrimination claim, we need not address Davis's alternative arguments that she did exhaust her administrative remedies or that requiring her to do so would have been futile.

APPENDIX B

UNITED STATES DISTRICT COURT,
S.D. TEXAS, HOUSTON DIVISION

LOIS M. DAVIS,

Plaintiff,

v.

FORT BEND COUNTY,

Defendant.

Civil Action No. 4:12-CV-131

Signed August 24, 2016

ORDER AND OPINION

MELINDA HARMON, UNITED STATES DISTRICT JUDGE

Pending before the Court is Defendant's Motion to Dismiss (Document No. 42). Plaintiff filed a Response (Document No. 49), and Defendant filed a Reply (Document No. 53). Having considered these filings, the facts in the record, and the applicable law, the Court concludes Defendant's Motion (Document No. 42) should be granted.

Background

Plaintiff originally filed a complaint in 2012, which included claims of retaliation and religious

discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17 ("Title VII"), and a claim of intentional infliction of emotional distress.[1] (Document No. 1). This Court granted Defendant's Motion for Summary Judgment (Document No. 13), which Plaintiff appealed to the Fifth Circuit. The Fifth Circuit affirmed the grant of summary judgment on Plaintiff's retaliation claim, but reversed the grant of summary judgment on Plaintiff's religious discrimination claim. (Document No. 27 at 17).[2] Therefore Plaintiff has filed an

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[1] This claim was not appealed to the Fifth Circuit, and has been abandoned.

[2] For thoroughness the Court also includes the factual and procedural background as summarized by the Fifth Circuit:

> Fort Bend hired Davis in December 2007 as a Desktop Support Supervisor responsible for supervising about fifteen information technology ("IT") technicians. Charles Cook ("Cook") was the IT Director at the time. In November 2009, he hired his personal friend and fellow church member, Kenneth Ford ("Ford"), as Davis's supervisor.
>
> On or about April 1, 2010, Davis filed a complaint with Fort Bend's Human Resources Department, alleging that Cook subjected her to constant sexual harassment and assaults soon after her employment began. Fort Bend placed Davis on Family Medical Leave Act ("FMLA") leave during its investigation of her complaint. The investigation substantiated Davis's allegations against Cook and ultimately led to Cook's resignation on April 22, 2010.
>
> According to Davis, Ford immediately began retaliating against her when she returned to work from FMLA leave. She alleged that Ford "effectively" demoted her by reducing the number of her direct reports from fifteen to four; removed her from projects she had previously managed; superseded her authority by giving orders and assigning

> different projects and tasks directly to Davis's staff; removed her administrative rights from the computer server; and assigned her tasks that similarly situated employees were not required to perform.
>
> In March 2011, Fort Bend prepared to install personal computers, network components, and audiovisual equipment into its newly built Fort Bend County Justice Center. All technical support employees, including Davis, were involved in the process. As the Desktop Support Supervisor, Davis and her team were to "assist with the testing of the computers [and] make sure all of the computers had been set up properly." The installation was scheduled for the weekend of July 4, 2011, and all employees were required to be present.
>
> On June 28, 2011, Davis informed Ford that she would not be available to work the morning of Sunday July 3, 2011, allegedly "due to a previous religious commitment." Davis testified that "[i]t was a special church service, and that I needed to be off that Sunday[,]...but I would be more than willing to come in after church services." Davis also testified that she had arranged for a replacement during her *484 absence, as she had done in the past. Ford did not approve her absence, stating that it "would be grounds for a write-up or termination." After Davis attended her church event and did not report to work, Fort Bend terminated Davis's employment.
>
> Davis filed suit against Fort Bend, alleging retaliation and religious discrimination under Title VII, and intentional infliction of emotional distress. The district court granted Fort Bend's motion for summary judgment on all claims and dismissed Davis's action. Davis timely appealed the district court's grant of summary judgment. On appeal, Davis challenges the grant of summary judgment on her Title VII claims, but not on her intentional infliction of emotional distress claim.

Davis v. Fort Bend Cty., 765 F.3d 480, 483–84 (5th Cir. 2014), *cert. denied sub nom. Fort Bend Cty., Tex. v. Davis*, 135 S. Ct. 2804 (2015).

Amended Complaint against Defendant, alleging only religious discrimination. (Document No. 39). Plaintiff alleges that she "possessed a sincere religious belief that she was obligated to attend church, by her own personal view of her religious faith, on July 3, 2011." *Id.* at 9. Therefore she informed her supervisor, Ford, of this obligation, and told him that she could return to work immediately after the service. *Id.* Plaintiff also arranged for a replacement during her absence. *Id.* Although Ford initially approved her request, he later denied it and informed Plaintiff that "she would be subject to discipline" if she did not report to work first thing in the morning (despite allowing another employee time off to attend a parade). *Id.* When Plaintiff chose to attend church, she was immediately terminated, despite the fact that Fort Bend County had suffered no hardship as a result of her absence. *Id.* at 10.

Defendant has filed a Motion to Dismiss Plaintiff's claim, arguing that "Plaintiff did not exhaust her administrative remedies relating to religious discrimination before filing suit." (Document No. 42 at 1). Plaintiff's original Charge of Discrimination filed with the Texas Workforce Commission ("TWC"), dated March 9, 2011, does not include religious discrimination. (Document No. 49-2 at 9). However, Plaintiff's intake questionnaire includes a handwritten addition of the word "religion" in the boxes labeled "Employment Harms or Actions." *Id.* at 17. The intake questionnaire was dated February 15, 2011, before the alleged religious discrimination. *Id.* Therefore Defendant notes that Plaintiff must have added "religion" to the intake questionnaire after its

completion. (Document No. 42 at 2). Plaintiff explains this in her declaration, stating:

> I amended my TWC intake form to include the word "Religion" as well as marking the Employment Harms or Actions of Discharge and Reasonable Accommodation. These modifications were made to inform the TWC of the religious discrimination which occurred upon my termination. [...] I presented the amended form to the TWC and the EEOC during late summer or fall of 2011, prior to November 2011.

(Document No. 49-2 at 2).

In an August 1, 2011 letter responding to the TWC's request for separation information, Defendant explained Plaintiff's termination for failing to report to work on July 3 and 4, 2011. *Id.* at 14. The relevant sections state:

> On June 28, 2011, two (2) days before the scheduled move, Ms Davis verbally notified her supervisor, Kenneth Ford, that she was not able to work on Sunday, July 3, 2011, because she had an all day church event to attend. Kenneth Ford informed Ms Davis that she was expected to work the entire weekend. Mr. Ford attempted to compromise with Ms Davis by allowing her the opportunity to go to church on Sunday morning and report to work after services. She rejected this offer. Mr. Ford informed her that if she did not report to work on Sunday, she would be subject to discipline up to and including termination. Ms Davis

> failed to report to work on Sunday, July 3, 2011. [...] The decision was made to terminate Ms Davis for failure to report to work on Sunday and Monday July 3 and 4 as directed.

Id. On November 20, 2011, Plaintiff received a predetermination letter from the TWC, explaining that it had made a preliminary decision to dismiss the charge. *Id.* at 19. The letter explains that "it cannot be established that the employer has discriminated against you based on Sex, Retaliation, or any other reason prohibited by the laws we enforce." *Id.* The letter mentions Plaintiff's "church commitments" briefly, but does not discuss her claims of religious discrimination. *Id.* at 20. Instead, the letter focuses largely on Fort Bend's response to the sexual harassment allegations, and details Plaintiff's termination for violation of policies (including her failure to come to work on July 3, 2011). *Id.* On November 17, 2011, Plaintiff received a "Dismissal and Notice of Right to File a Civil Action" from the TWC. *Id.* at 22. On December 15, 2011, Plaintiff received a "Notice of Right to Sue Within 90 Days" from the Department of Justice. *Id.* at 29.

Parties' Motions

Defendant's Motion to Dismiss argues that "Plaintiff did not exhaust her administrative remedies relating to religious discrimination before filing suit," because her Charge of Discrimination "does not include religion as a basis of discrimination." (Document No. 42 at 1). Defendant argues that Plaintiff's questionnaire was not

sufficient to "satisfy her burden of having exhausted her administrative remedies," citing *Harris v. David McDavid Honda*, 213 Fed.Appx. 258 (5th Cir. 2006). *Id.* at 2. Defendant also takes issue with the questionnaire itself, arguing that it "was altered to include her religion claim after being completed and before being filed with this Court." *Id.* at 1-2. Although Defendant has not raised the argument that Plaintiff did not exhaust her administrative remedies previously, Defendant argues that it is an issue of subject matter jurisdiction, and therefore can be raised with the Court at any time. *Id.* at 3.

Plaintiff's Response first argues that the issue is not one of subject matter jurisdiction, and therefore Defendant waived its defense that Plaintiff did not exhaust her administrative remedies. (Document No. 49 at 10). Plaintiff also argues that "Davis exhausted her administrative remedies by providing clear notice of her claims in an amendment to her TWC charge documents. The TWC and therefore the EEOC's own documents demonstrate that the relevant administrative agencies had notice of, and considered, Davis's amended claims." *Id.* at 10-11. In addition Plaintiff argues that "under controlling Fifth Circuit law, further acts of discrimination that occur after the filing of an initial charge of discrimination (such as the employee's ultimate termination) need not be raised in a new EEOC complaint;" that "Davis exhausted her administrative remedies because her lawsuit arose out of the investigation conducted by the EEOC/TWC;" and finally that "any failure to exhaust remedies is excused because, in these circumstances, exhaustion would have been futile." *Id.* at 11.

Defendant's Reply again argues that the failure to exhaust administrative remedies is jurisdictional, and also argues that Plaintiff's religious discrimination claim was not adjudicated or exhausted by the EEOC, and that "Fort Bend timely raised Plaintiff's non-exhaustion of remedies." (Document No. 53 at 3).

Standard of Review

Exhaustion of Remedies

"Employment discrimination plaintiffs must exhaust administrative remedies before pursuing claims in federal court. Exhaustion occurs when the plaintiff files a timely charge with the EEOC and receives a statutory notice of right to sue." *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378-79 (5th Cir. 2002) (citation omitted). "Courts should not condone lawsuits that exceed the scope of EEOC exhaustion, because doing so would thwart the administrative process and peremptorily substitute litigation for conciliation. Nevertheless, competing policies underlie judicial interpretation of the exhaustion requirement." *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 273 (5th Cir. 2008) (citation omitted). "On the one hand, because 'the provisions of Title VII were not designed for the sophisticated,' and because most complaints are initiated *pro se*,[3] the scope of an EEOC complaint should be construed liberally." *Pacheco v. Mineta*, 448 F.3d 783, 788–89 (5th Cir.

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[3] Notably, Plaintiff was not *pro se*; she listed her attorney on the original questionnaire. (Document No. 49-2 at 4).

2006) (citations omitted). "On the other hand, a primary purpose of Title VII is to trigger the investigatory and conciliatory procedures of the EEOC, in attempt to achieve nonjudicial resolution of employment discrimination claims." *Id.* "With that balance in mind, this court interprets what is properly embraced in review of a Title–VII claim somewhat broadly, not solely by the scope of the administrative charge itself, but by the scope of the EEOC investigation which 'can reasonably be expected to grow out of the charge of discrimination.' " *Id.* This involves a "fact-intensive analysis" of the administrative charge, and looking "slightly beyond its four corners, to its substance rather than its label." *Id.*

Failure to Exhaust as a Jurisdictional Issue

The Court will first address whether a failure to exhaust administrative remedies is "merely a prerequisite to suit, and thus subject to waiver and estoppel, or whether it is a requirement that implicates subject matter jurisdiction." *Id.* at 788 n. 7. The Court finds that this is a jurisdictional issue. As noted in *Mineta*, there is "disagreement in this circuit" regarding this issue, as "[n]either the Supreme Court nor this court sitting en banc has ruled that the exhaustion requirement is subject to waiver or estoppel, and our panels are in disagreement over that question." *Id.*[4] However, this

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[4] The cases cited for this proposition in Mineta are as follows:

Compare Tolbert v. United States, 916 F.2d 245, 247 (5th Cir. 1990) ("[I]t is the well-settled law of this circuit that

Court recently explained that "[w]hat appears to be the most recent Fifth Circuit case addressing this issue [*Simmons-Myers v. Caesars Entertainment Corp.*] makes clear that the failure to administratively exhaust is viewed as a jurisdictional bar to suit." *Muoneke v. Prairie View A&M Univ.*, No. CV H-15-2212, 2016 WL 3017157, at *6 n.2 (S.D. Tex. May 26, 2016) (citing *Simmons-Myers v. Caesars Entm't Corp.*, 515 Fed.Appx. 269, 272 (5th Cir. 2013)) ("[C]ourts have no jurisdiction to consider Title VII claims as to which the aggrieved party has not exhausted administrative remedies.") (per curiam) (citing *Nat'l Ass'n of Gov't Emps. v. City of Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 711 (5th Cir. 1994)). *Compare Yee v. Baldwin-Price*, 325 Fed.Appx. 375, 378 (5th Cir. 2009) ("The exhaustion requirement is not jurisdictional, however, and is subject to the traditional equitable defenses of waiver, estoppel, and equitable tolling.") (per curiam) (citing *Pacheco v. Rice*, 966 F.2d 904, 906 (5th Cir.

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each [Title VII] requirement is a prerequisite to federal subject matter jurisdiction.") *and Porter v. Adams*, 639 F.2d 273, 276 (5th Cir. 1981) ("The exhaustion requirement...is an absolute prerequisite to suit") *and Randel v. Dep't. of U.S. Navy*, 157 F.3d 392, 395 (5th Cir. 1998) ("If the claimant fails to comply with either of these [Title VII] requirements then the court is deprived of jurisdiction over the case.") *with Young v. City of Houston, Tex.*, 906 F.2d 177, 180 (5th Cir. 1990) ("A failure of the EEOC prerequisite does not rob a court of jurisdiction.") and *Fellows v. Universal Restaurants, Inc.*, 701 F.2d 447, 449 (5th Cir. 1983) ("The basic two statutory requirements (although these are not necessarily 'jurisdictional') for a Title VII suit are....").

Pacheco v. Mineta, 448 F.3d 783, 788 n.7 (5th Cir. 2006).

1992)). Both *Simmons-Myers* and *Yee* were designated as unpublished opinions by the Fifth Circuit, and are therefore not precedent, but may be viewed as persuasive. *Cantu v. Hidalgo Cty.*, 398 S.W.3d 824, 830 n. 2 (Tex. App.—Corpus Christi 2012, review denied). The Court agrees with the reasoning in *Muoneke* that *Simmons-Myers* is more persuasive, as it was decided most recently. 2016 WL 3017157, at *6 n. 2.[5]

Furthermore, *Muoneke* explains that "[t]he disagreement centers on whether the Supreme Court's decision in *Zipes*[6] [ ], which made clear that Title VII's limitations period for filing an EEOC charge was mandatory but nonjurisdictional, also applies to the administrative-exhaustion requirement." *Id.* The Court believes that the finding in *Zipes* does not apply to the administrative-exhaustion requirement, because *Zipes* "relies heavily on legislative history and Supreme Court precedents that characterize the filing deadlines as statutes of limitations," reasoning which does not

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[5] Similarly, a 2014 case discussing the Rehabilitation Act noted that federal subject matter jurisdiction does not exist if administrative remedies are not exhausted. *Ruiz v. Donahoe*, 569 Fed.Appx. 207, 211–12 (5th Cir. 2014) (per curiam), *reh'g denied*, 784 F.3d 247 (5th Cir. 2015) (citing *Tolbert*, 916 F.2d at 247-8) (Title VII's exhaustion requirement is a "prerequisite to federal subject matter jurisdiction."). The Fifth Circuit has held that "the 1978 amendments to the Rehabilitation Act 1) established a private right of action, *subject to the same procedural constraints (administrative exhaustion, etc.)* set forth in Title VII of the Civil Rights Act ...." *Prewitt v. U.S. Postal Serv.*, 662 F.2d 292, 304 (5th Cir. 1981) (emphasis added).

[6] *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

extend to the exhaustion requirement. *Mineta*, 448 F.3d at 788 n. 7 (citing *Henderson v. U.S. Veterans Admin.*, 790 F.2d 436, 440 (5th Cir. 1986) ("The filing deadlines are in the nature of statutes of limitations which are subject to waiver, estoppel, and equitable tolling."). *Compare Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (The legislative history states that the purpose of the filing provision is "preventing 'stale' claims, the end served by a statute of limitations.") (citation omitted), *with McClain*, 519 F.3d at 273 ("[T]he 'primary purpose of Title VII is to trigger the investigatory and conciliatory procedures of the EEOC, in [an] attempt to achieve non-judicial resolution of employment discrimination claims.' ") (citation omitted).

For these reasons, the Court finds that the exhaustion requirement is jurisdictional; therefore the Court will consider Defendant's Motion under Rule 12(b)(1). *Muoneke*, 2016 WL 3017157, at *6.[7]

Standard of Review under FRCP 12(b)(1)

Rule 12(b)(1) allows a party to move for dismissal of an action for lack of subject matter jurisdiction. The party asserting that subject matter jurisdiction exists, here the Plaintiff, must bear the burden of proof by a preponderance of the evidence for a 12(b)(1) motion. *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 327 (5th Cir. 2008); *Ramming*

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[7] Plaintiff's waiver arguments therefore become irrelevant, as "[c]hallenges to subject-matter jurisdiction can of course be raised at any time prior to final judgment." *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 571 (2004).

v. United States, 281 F.3d 158, 161 (5th Cir. 2001). In reviewing a motion under 12(b)(1) the court may consider (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981).

This motion is characterized as a "factual" attack, i.e., the facts in the complaint supporting subject matter jurisdiction are questioned. *In re Blue Water Endeavors, LLC*, Bankr. No. 08-10466, Adv. No. 10-1015, 2011 WL 52525, *3 (E.D. Tex. Jan. 6, 2011) (citations omitted). In a factual attack, the Court may consider any evidence (affidavits, testimony, documents, etc.) submitted by the parties that is relevant to the issue of jurisdiction. *Id.* The court's consideration of such matters outside the pleadings does not convert the motion to one for summary judgment under Rule 56(c). *Robinson v. Paulson*, H-06-4083, 2008 WL 4692392 at *10 (S.D. Tex. Oct. 28, 2008) (citation omitted). "[W]hen a factual attack is made upon federal jurisdiction, no presumption of truthfulness attaches to the plaintiffs' jurisdictional allegations, and the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In a factual attack, the plaintiffs have the burden of proving that federal jurisdiction does in fact exist." *Evans v. Tubbe*, 657 F.2d 661, 663 (5th Cir. 1981). In resolving a factual attack on subject matter jurisdiction under Rule 12(b)(1), the district court, which does not address the merits of the suit, has significant authority " 'to weigh the evidence and satisfy itself as to the

existence of its power to hear the case.' " *Robinson*, 2008 WL 4692392 at *10 (citations omitted).

Discussion

As discussed above, Plaintiff's Charge of Discrimination does not mention religious discrimination. (Document No. 49-2 at 9), but Plaintiff argues that her amendment to the TWC intake questionnaire was sufficient to exhaust her administrative remedies. (Document No. 49 at 17). The Court disagrees. As noted in *Harris v. Honda*, "an intake questionnaire does not constitute a charge." 213 Fed.Appx. at 261.[8] *Harris* explained that the "primary difference between intake questionnaires and formal charges of discrimination is the notification requirement of a charge," and that "equating intake questionnaires to charges, without more, would be the equivalent of dispensing with the requirement to notify the perspective defendant." *Id.* (citing *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 79 (7th Cir. 1992)). Therefore the Court ruled that the plaintiff's intake questionnaire could not substitute for a proper charge, because the plaintiff failed to provide any evidence that defendant received notice of the plaintiff's claim. *Id.* at 262. *Compare Price v. Sw. Bell Tel. Co.*, 687 F.2d 74, 78 (5th Cir. 1982) (unsigned form was sufficient to set "administrative machinery in motion" where defendant received notice and the EEOC actually

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[8] Although unpublished, the Court finds this opinion persuasive. *Cantu v. Hidalgo Cty.*, 398 S.W.3d 824, 830 n. 2 (Tex. App.—Corpus Christi 2012, reviewed denied).

investigated the plaintiff's allegations). Similarly, Plaintiff has provided no evidence that Defendant was aware of her amendment to the questionnaire, only stating that she "presented the amended form to the TWC and the EEOC,"[9] and generally referring to Fort Bend's letter to the TWC. (Document No. 49-2 at 2). Fort Bend's letter to the TWC does not demonstrate it had any awareness of Plaintiff's religious discrimination claim. [10] In the letter Defendant mentions Plaintiff's claim that she needed to attend church, but only in the context of explaining that she was terminated for failing to come to work. *Id.* at 14. There is no mention of Plaintiff's claim of religious discrimination; the letter largely functions as a response to allegations of retaliation, and does not appear to present a defense to religious discrimination claims. Without concrete evidence of this notice, it would not be appropriate to view the amended questionnaire as a charge. *Compare Price*, 687 F.2d at 78 (fact that employer received official notice of the charge was undisputed).

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[9] Furthermore, Plaintiff does not provide any evidence, other than her own statement, that this occurred. As discussed in greater detail below, there is no evidence that the EEOC considered her claim of religious discrimination, which it presumably would have done upon receipt of her updated form. Therefore the Court believes Plaintiff's claim is questionable at best. Even if true, however, the amendment to the intake questionnaire was not sufficient to exhaust her administrative remedies.

[10] The letter was dated August 1, 2011, while Plaintiff claims that she sent the amended form to the TWC "during late summer or fall of 2011, prior to November 2011." (Document No. 49-2 at 2, 14). Therefore, based on the dates alone, it is not clear that Defendant could have been aware of the amendment.

In addition, Plaintiff's amendment to the questionnaire was not under oath, and was factually unrelated to her original allegations of gender discrimination and retaliation in the charge. Courts have explained that "a charge must 'be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.' [42 U.S.C. § 2000e-5(b)]. The verification requirement is designed to protect an employer from the filing of frivolous claims." *Price*, 687 F.2d at 77 (citing *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 231 (5th Cir. 1969)). Also, Plaintiff's religious discrimination claims are not at all related to her claims of sex discrimination or retaliation, a factor the *Harris* Court, as well as this Court and the Northern District of Texas, have found relevant in determining whether to consider documents other than the charge. *Harris*, 213 Fed.Appx. at 261-262 (noting that allegations in the intake questionnaire were not "like or related to the allegations within the charge"); *Kojin v. Barton Protective Servs.*, 339 F. Supp. 2d 923, 929 (S.D. Tex. 2004) (The Court dismissed plaintiff's age discrimination claims, partly because the claims were only mentioned in a questionnaire, and were "not a reasonable consequence of the facts [alleging discrimination based on national origin] set forth in the EEOC Charge of Discrimination."); *Hayes v. MBNA Tech., Inc.*, No. CIV.A.3:03-CV1766-D, 2004 WL 1283965, at *6 (N.D. Tex. June 9, 2004) ("Accordingly, the court holds that, when determining whether a claim has been exhausted, the decision is to be based on the four corners of the EEOC charge, but the court may also consult related documents, such as a plaintiff's affidavit, her

response to the EEOC questionnaire, and attachments to the response, *when (1) the facts set out in the document are a reasonable consequence of a claim set forth in the EEOC charge*, and (2) the employer had actual knowledge of the contents of the document during the course of the EEOC investigation.") (emphasis added). *Compare Wolf v. E. Texas Med. Ctr.*, 515 F. Supp. 2d 682, 688–89 (E.D. Tex. 2007) (allowing plaintiff's questionnaires to be construed as a timely charge, where the plaintiff "later filed a Charge of Discrimination concerning the same factual allegations").

It is also notable that Plaintiff's only addition to her questionnaire was including the word religion, and "marking the Employment Harms or Actions of Discharge and Reasonable Accommodation." (Document No. 49-2 at 2). Plaintiff did not include any additional information or explain her new claim whatsoever, despite the warning at the top of the questionnaire stating that "you must provide complete information or your complaint may be dismissed." *Id.* at 4. Several courts have explained that the most crucial elements of a charge of discrimination are the factual statements therein; without adding any additional facts to her questionnaire, it is unclear how the EEOC/TWC could have followed up on her new claims. *See Jaber v. Metro. Transit Auth. of Harris Cty., Tex.*, No. 4:14-CV-201, 2014 WL 4102120, at *2 (S.D. Tex. Aug. 14, 2014) ("However, "[b]ecause factual statements are such a major element of a charge of discrimination, [courts] will not construe the charge to include facts that were initially omitted.") (citations omitted); *Vlasek v. Wal-Mart Stores, Inc.*, No. CIV.A. H-07-

0386, 2007 WL 2402183, at *3 (S.D. Tex. Aug. 20, 2007) ("[T]he crucial element of a charge of discrimination is the factual statement contained therein.") (citations omitted). *See also Price*, 687 F.2d at 78 ("We also take into account the principal function of the administrative charge: the provision of an adequate factual basis for the Commission's initiation of the investigatory and conciliatory procedures contemplated by Title VII.").

Furthermore, there is no evidence that the EEOC investigated Plaintiff's claim of religious discrimination. The only evidence cited by Plaintiff for her proposition that "the EEOC/TWC acknowledged, considered, and took into account Davis's claims of religious discrimination" is Fort Bend's letter to the TWC (discussed above), and the TWC's predetermination letter. (Document No. 49 at 18). The pre-determination letter contains no discussion of potential religious discrimination suffered by Plaintiff; it states that "it cannot be established that the employer has discriminated against you based on *Sex, Retaliation*, or any other reason prohibited by the laws we enforce." (Document No. 49-2 at 19) (emphasis added). The letter contains thorough discussion of Defendant's response to Plaintiff's sexual harassment allegations, but does not include any discussion of religious discrimination. *Id.* at 19-20.[11] Plaintiff's "church

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[11] For example, it does not include any discussion of Fort Bend's obligation "to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship," which would be highly relevant to a religious discrimination claim. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977). Nor does it discuss elements of religious

commitments" are only mentioned briefly, and as part of the letter's explanation that Plaintiff was fired for violation of policies, and not as retaliation for her sexual harassment complaint. *Id.* The "actual scope of the EEOC's investigation" is "clearly pertinent to an exhaustion inquiry," and in this case strongly suggests that Plaintiff has not exhausted her remedies regarding the religious discrimination claim. *McClain*, 519 F.3d at 274 (citations omitted).

Additionally, the Court does not believe that a religious discrimination investigation could reasonably have been expected to grow out of Plaintiff's original charge of discrimination, which only alleged retaliation and discrimination based on sex. *Young v. City of Houston, Tex.*, 906 F.2d 177, 179 (5th Cir. 1990) ("The scope of inquiry of a court hearing in a Title VII action is limited to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.") (internal quotations and citation omitted). Religion and sex are obviously very different, and the EEOC could not have been expected to investigate religious discrimination based on Plaintiff's charge of gender discrimination. *See, e.g., Thomas v. Texas Dep't of Criminal Justice*,

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discrimination, such as the plaintiff's bona fide religious belief. *Hackney v. Texas Dep't of Criminal Justice*, No. CIV.A.1:07CV113TH, 2009 WL 2391232, at *6 (E.D. Tex. Aug. 4, 2009) ("To establish a prima facie case of religious discrimination under Title VII, [plaintiff] must prove that: (1) he had a bona fide religious belief that conflicted with an employment requirement; (2) his employer was informed of that belief; and (3) he was disciplined for failing to comply with the conflicting employment requirement.") (citing *Jenkins v. Louisiana*, 874 F.2d 992, 995 (5th Cir. 1989)).

220 F.3d 389, 395 (5th Cir. 2000) (charge alleging gender discrimination "did not necessarily encompass" race discrimination claim). In affirming dismissal of her retaliation claim, the Fifth Circuit explained that Plaintiff's religious discrimination claim was not related to her retaliation claim:

> Turning to her termination, there is no dispute that it was an adverse action. However, Davis does not present any evidence that Fort Bend's legitimate, non-retaliatory reason for terminating her—that she failed to report to work—was pretext for retaliation. Instead, she argues only that Fort Bend's reason for terminating her was pretext for its *religious discrimination*. This is irrelevant to her *retaliation* claim.

Davis v. Fort Bend Cty., 765 F.3d 480, 491 (5th Cir. 2014), *cert. denied sub nom. Fort Bend Cty., Tex. v. Davis*, 135 S. Ct. 2804 (2015).

Plaintiff cites *Gupta v. East Texas State University* for the proposition that "a charging party need not file an amendment to her EEOC/TWC charge of discrimination every time an additional act covered by Title VII occurs." (Document No. 49 at 19) (citing 654 F.2d 411, 414 (5th Cir. 1981)). In *Gupta* the plaintiff had filed two complaints/charges with the EEOC: one alleging discrimination based on race, and a second alleging retaliation because of the first charge. 654 F.2d at 414. Once Gupta initiated his district court case, his contract was not renewed. *Id.* However, he never filed a third charge with the EEOC detailing this additional retaliation. *Id.* The Court found that a third charge was not necessary,

explaining that "the district court has ancillary jurisdiction to hear such a claim when it grows out of an administrative charge that is properly before the court." *Id.* Plaintiff's case is different from *Gupta* for several reasons. First, *Gupta* considered additional acts of *retaliation*, not discrimination. Plaintiff's retaliation claim has already been dismissed. [12] Second, Gupta's claim that he was fired due to his complaint clearly "grows out" of his second charge; it is another act of retaliation directly *related to* the second charge. As discussed above, Plaintiff's religious discrimination claim is completely different from her sex and retaliation claims, and therefore cannot "grow out" of her prior charge. *See also Manning v. Chevron Chem. Co., LLC*, 332 F.3d 874, 879 (5th Cir. 2003) ("Despite the important policy justifications for requiring employees to assert all of their claims in the original charge, we have identified one very narrow exception to this general rule. We have held that an amendment, even one that alleges a new theory of recovery, can relate back to the date of the original charge *when the facts supporting both the amendment and the original charge are essentially the same.*") (emphasis added).

Finally, Plaintiff argues that exhaustion would have been futile. However, Plaintiff cites no Fifth

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[12] Plaintiff argues in this section that, during the pendency of the EEOC investigation, she "was fired, in large part in retaliation for her previous Title VII complaints." (Document No. 49 at 20). First, as noted above, her retaliation claims have already failed; this argument is not relevant to her religious discrimination claim. Second, her argument that she was fired "in large part" for her prior complaints would appear to discredit her religious discrimination claims.

Circuit precedent for her futility argument. Furthermore, the only case Plaintiff cites applying this futility standard to Title VII also held that the exhaustion requirement at issue was merely prudential, not jurisdictional. *Wilson v. MVM, Inc.*, 475 F.3d 166, 174 (3d Cir. 2007). As discussed above, the exhaustion requirement is jurisdictional, and therefore cannot be excused by futility. *Id.*

Conclusion

For the reasons stated above, the Court finds that Plaintiff failed to exhaust her administrative remedies regarding her religious discrimination claim. Her alleged amendment to the questionnaire was insufficient because Plaintiff has not demonstrated that Defendant had notice of the new claim, the form was not under oath, and the amendment was completely unrelated to her original claims. Furthermore, there is no evidence that the TWC/EEOC actually investigated her religious discrimination claim. Without the alleged amendment her religious discrimination claims do not reasonably grow out of the original charge.

Therefore, this Court does not have subject-matter jurisdiction over her claim, and her claim must be dismissed. Furthermore, re-pleading the claim for religious discrimination would be futile, as more than five years have passed since Plaintiff's termination. Therefore the dismissal will be with prejudice. *Jaber*, 2014 WL 4102120, at *4.

The Court hereby ORDERS that Defendant's Motion to Dismiss (Document No. 42) is GRANTED

and Plaintiff's claim of religious discrimination is DISMISSED with prejudice.

SIGNED at Houston, Texas, this 24th day of August, 2016.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20640

LOIS M. DAVIS,
Plaintiff-Appellant,

v.

FORT BEND COUNTY,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

Filed: July 20, 2018

ON PETITION FOR REHEARING EN BANC

(Opinion June 20, 2018, 5 Cir., ____, ____ F.3d ____)

Before KING, JONES AND ELROD, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En

Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Jennifer W. Elrod
UNITED STATES CIRCUIT JUDGE

APPENDIX D

Section 706 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, provides:

Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission

shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on

reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[1] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the

person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or

other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the

Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and

may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful

employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay;

reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would

have taken the same action in the absence of the impermissible motivating factor, the court--

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of Title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of Title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United

States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

No. 18-525

IN THE

Supreme Court of the United States

FORT BEND COUNTY,

Petitioner,

v.

LOIS M. DAVIS,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the defense that a Title VII plaintiff failed to exhaust administrative remedies is subject to waiver.

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INTRODUCTION

Respondent Lois Davis sued petitioner Fort Bend County for religious discrimination in violation of Title VII. After "five years and an entire round of appeals all the way to the Supreme Court," petitioner argued for the first time that the claim should be dismissed because respondent failed to exhaust her administrative remedies. Pet. App. 14a. The Fifth Circuit concluded that "[o]n these facts," petitioner had "forfeited its opportunity to assert this claim." *Id.* 15a.

Petitioner now challenges that holding, stressing that some courts other than the Fifth Circuit have labeled Title VII's administrative exhaustion requirement as "jurisdictional." But, as this Court has repeatedly observed, the lower courts over the years have been "less than meticulous" in their "profligate" use of that term. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510-11 (2006). All petitioner accomplishes here is to demonstrate as much. None of the supposedly conflicting cases petitioner cites required the courts to decide whether Title VII exhaustion is truly jurisdictional in the sense that it is not subject to waiver or other equitable exceptions.

That leaves petitioner with no credible argument for certiorari. This Court's decisions in *Arbaugh* and *Zipes v. Trans World Airlines*, 455 U.S. 385 (1982), make clear that Title VII's administrative exhaustion requirement is not jurisdictional in the proper sense of the term; instead, it is a claim-processing rule subject to equitable exceptions. Indeed, in every appellate case in which waiver or another equitable exception has actually been at issue, the courts have held—just like the Fifth Circuit here—that defendants may lose the ability to press the exhaustion requirement.

What is more, the question whether the failure-to-exhaust defense is subject to waiver rarely arises. Everyone agrees that when employers properly point out plaintiffs' failure to exhaust, courts are duty bound to dismiss the claims. Thus, the question presented arises only when plaintiffs fail to exhaust *and* employers fail to raise that defense in a timely manner. Employers are seldom so careless as to wait years to claim that a plaintiff never exhausted administrative remedies.

Finally, this case presents a poor vehicle for addressing the rules that should govern in cases where a plaintiff fails to exhaust a claim. Ms. Davis in fact exhausted her religious discrimination claim.

STATEMENT OF THE CASE

A. Factual background

Lois Davis is a "devout Christian." Record on Appeal (ROA) 313. An active member of her church, she has long attended 8:00 AM and 10:00 AM services every Sunday. *Id.* She also participates in Tuesday night Bible studies and holds "an important role" in her church's administration. *Id.*

Petitioner hired Ms. Davis in December 2007 as a Desktop Support Supervisor in its IT Department. She supervised fifteen employees. As the sole provider for her son, she was committed to "doing the best job possible" in order to "get [her] son graduated from high school, and off to college." ROA 645.

Soon after Ms. Davis started her new job, the Director of the IT Department, Charles Cook, began subjecting her to "constant sexual harassment and assaults." Pet. App. 17a n.2. She filed a complaint with Fort Bend County's Human Resources office and was

placed on paid leave during the pendency of the investigation. The investigation substantiated her allegations. Mr. Cook resigned, and Ms. Davis got back to work. *Id.*

After she returned from paid leave, Ms. Davis's direct supervisor, Kenneth Ford, retaliated against her in a variety of ways. A close friend of Mr. Cook, Mr. Ford reduced Ms. Davis's number of "direct reports from fifteen to four," "removed [her] from projects she previously managed," "superseded her authority" by assigning tasks directly to her subordinates, and "removed her administrative rights" to the server. Pet. App. 17a n.2.

In response, Ms. Davis filled out an intake questionnaire and filed a charge with the Texas Workforce Commission (TWC) alleging retaliation and discrimination on the basis of sex. Pet. App. 19a. Because the TWC has a work-sharing agreement with the EEOC, the state agency processes employment grievances brought under Title VII and other federal laws. *Id.*

While her complaint was pending, petitioner instructed Ms. Davis to help install computers and other hardware in the newly built Fort Bend County Justice Center. Pet. App. 18a n.2. Petitioner scheduled the installation for the weekend of July 2-4, 2011. Ms. Davis advised petitioner that she needed to attend a "special church service" that Sunday. *Id.* To make up for her absence, Ms. Davis arranged for a replacement to carry out her responsibilities—something she had done in the past. *Id.* And she made clear to Mr. Ford that she was "more than willing" to resume working on the project as soon as her church service ended. *Id.*

But Mr. Ford would not accommodate her religious observance. Indeed, he notified her that attending the service would be "grounds for a write-up or termination." Pet. App. 18a n.2.

On Sunday, Ms. Davis nevertheless went to church. She was "immediately terminated." Pet. App. 19a. Yet no similar fate befell a coworker who took time off that weekend to attend a parade. *Id.*

After her firing, Ms. Davis returned to the TWC. She amended her intake form to include "Religion" as one of the "Employment Harms" she suffered. Pet. App. 20a. She also added two new complaints to that section of the form: "Discharge" and "Reasonable Accommodation." *Id.*

A few months later, the TWC issued a letter advising Ms. Davis it had completed a "careful review" of her claims, including her allegation that she was fired after attending to "Church commitments." ROA 658-59. The TWC explained that barring new developments, it would dismiss her claims.

Shortly thereafter, the TWC dismissed the claims and issued Ms. Davis a right-to-sue letter. Pet. App. 21a. The federal government followed with a right-to-sue letter of its own. *Id.*

B. Procedural background

1. Ms. Davis filed suit against petitioner under Title VII, alleging religious discrimination, sex-based discrimination, and retaliation. The district court initially granted petitioner summary judgment on all of these claims. But the Fifth Circuit reversed and remanded. After examining the record, it found "genuine disputes of material fact" over whether "(1) Davis held a bona fide religious belief that she needed

to attend the Sunday service; and (2) Fort Bend would have suffered an undue hardship in accommodating Davis's religious observance." Pet. App. 3a. This Court denied petitioner's request for certiorari. 135 S. Ct. 2804 (2015).

The case then returned to the district court. It was at this point—five years after the start of litigation—that petitioner changed tack: It argued, for the first time, that Ms. Davis is barred from claiming religious discrimination because she did not exhaust her administrative remedies on that claim. In response, Ms. Davis maintained that petitioner waived its exhaustion defense by failing to raise it in a timely manner.[1] Pet. App. 4a. She argued in the alternative that she had satisfied the exhaustion requirement. *Id.*

The district court sided with petitioner and dismissed Ms. Davis's claim. *See* Pet. App. 37a. It held that Ms. Davis's waiver argument was "irrelevant" because the administrative exhaustion requirement is "jurisdictional." *Id.* 27a & n.7. It also concluded that Ms. Davis had not properly exhausted her religious discrimination claim. *Id.* 37a.

2. The Fifth Circuit unanimously reversed. It began by noting that the term "jurisdiction" has often been used imprecisely. Pet. App. 5a-6a. Cutting through this imprecision, the panel held that the administrative exhaustion requirement in Title VII is

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[1] In keeping with the petition for certiorari, this brief refers to failing to raise the exhaustion defense in a timely manner as "waiver." Though such conduct might more accurately be characterized as "forfeiture," the distinction is irrelevant here. Anyhow, this Court has often used these terms "interchangeably." *Freytag v. Comm'r*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment).

a claim-processing rule—and thus subject to waiver—rather than a true jurisdictional prerequisite. *Id.* 14a.

The Fifth Circuit grounded this holding in precedent. Prior Fifth Circuit cases had relied on this Court's holding in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), to conclude that no aspect of Title VII's exhaustion requirement implicates courts' subject matter jurisdiction. Pet. App. 8a (citing *Womble v. Bhangu*, 864 F.2d 1212, 1213 (5th Cir. 1989)). Reaching a contrary conclusion now, the court of appeals explained, would be "out-of-step" with this Court's later Title VII decision in *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). Pet. App. 11a. In *Arbaugh*, this Court held that a statutory requirement is jurisdictional only if the statute "clearly states" as much. 546 U.S. at 515. Applying this rule, the court of appeals observed that "Congress did not suggest—much less clearly state—that Title VII's administrative exhaustion requirement is jurisdictional." Pet. App. 10a.

Turning to the facts, the court of appeals found it "abundantly clear" that petitioner had "forfeited" its opportunity to raise the administrative exhaustion defense. Pet. App. 15a. In light of that holding, the Fifth Circuit determined it "need not address" whether Ms. Davis actually "exhaust[ed] her administrative remedies." *Id.* 15a n.5.

3. Petitioner again seeks certiorari.

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit's decision is plainly correct.

This Court has repeatedly noted that "jurisdiction" is "a word of many, too many, meanings." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006)

(quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998)). Over the years, courts have improperly used the term "jurisdictional" in relation to an "ingredient[] of a federal claim" or something else that a plaintiff must establish to prevail. *Id.* at 503. But that "elastic concept of jurisdiction is not what the term 'jurisdiction' means today." *United States v. Cotton*, 535 U.S. 625, 630 (2002). In its proper usage, jurisdiction means "a court's power to hear a case." *Id.*

The "distinction between truly jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim-processing rules,' which do not," is significant. *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004)). If a requirement is "truly jurisdictional," a court is obliged to dismiss a case regardless of when and how failure to satisfy the requirement comes to the court's attention. *Id.* If the requirement is not jurisdictional, it is "subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982). That is, "[u]nlike jurisdictional rules, mandatory claim-processing rules may be forfeited if the party asserting the rule waits too long to raise the point." *Manrique v. United States*, 137 S. Ct. 1266, 1272 (2017) (internal quotation marks omitted).

Petitioner concedes that it did not raise its failure-to-exhaust defense in a timely manner. Pet. 3, 24. The only question, therefore, is whether the defense is subject to waiver. This Court's precedent—as well as general principles governing the distinction between jurisdictional and claim-processing rules—makes clear that it is.

A. This Court's Title VII precedent dictates that the failure-to-exhaust defense is subject to waiver.

1. This Court has already decided two cases involving prerequisites for bringing a Title VII suit: *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), and *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). Those cases demonstrate that the statute's mandate to exhaust administrative remedies is not a jurisdictional requirement.

In *Zipes*, this Court held that the requirement of timely filing with the EEOC is a claim-processing rule subject to waiver. 455 U.S. at 393. Petitioner tries to cabin *Zipes* to Title VII's time allotment for initiating the administrative process. Pet. 22. But the reasoning in *Zipes* extends to the statute's exhaustion requirement more generally. The Court explained that "the provision specifying the time for filing charges with the EEOC . . . does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." 455 U.S. at 394. The provision is also "entirely separate" from the one granting district courts jurisdiction: 42 U.S.C. § 2000e-5(f)(3). *Id.*

Both of these points apply equally here. Title VII's provisions establishing the administrative exhaustion requirement "say[] nothing about a connection between the EEOC enforcement process and the power of a court to hear a Title VII case." Pet. App. 10a. Rather, the provision petitioner cites merely outlines circumstances when the "aggrieved" party "may" bring a "civil action." 42 U.S.C. § 2000e-5(f)(1). Furthermore, the provision petitioner cites is separate from Title VII's actual jurisdictional provision, which appears two subsections away in Section 2000e-5(f)(3). And

that jurisdictional provision makes no mention whatsoever of administrative exhaustion.

Zipes's reliance on *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), confirms that its ruling applies to Title VII's administrative exhaustion requirement as a whole. In *Franks*, the lower courts denied relief for Title VII plaintiffs on the ground that those individuals "had not filed administrative charges" at all. *Zipes*, 455 U.S. at 396. Yet this Court held that the plaintiffs' claims could go forward. As *Zipes* recognized, this decision (and Congress's acquiescence in it) establishes that "the provision for filing charges with the EEOC should not be construed to erect a jurisdictional prerequisite to suit in the district court." *Id.*

Arbaugh reinforces that the logic in *Zipes* extends beyond Title VII's administrative filing period. In *Arbaugh*, the Court held the employee numerosity requirement in Title VII is subject to waiver by the defendant. 546 U.S. at 516. As in *Zipes*, the Court stressed that Title VII has an actual "jurisdictional provision" and that "the 15-employee threshold appears in a separate provision that 'does not speak in jurisdictional terms.'" *Id.* (quoting *Zipes*, 455 U.S. at 394). The same reasoning compels the conclusion that the failure-to-exhaust defense may be waived.

2. None of the case law petitioner references is to the contrary. Citing two cases from the 1970s, petitioner first maintains this Court has "long interpreted" Title VII's exhaustion requirement as "jurisdictional." Pet. 20-21 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)). But this Court explained in *Zipes* that neither of those cases

carries any precedential weight with respect to the question at hand here. Although both labeled the exhaustion requirement "jurisdictional," "the legal character of the requirement was not at issue" in either case. *Zipes*, 455 U.S. at 395; *see also id.* at 393 & n.6; *Arbaugh*, 546 U.S. at 511.

Petitioner also quotes language from *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134 (2008), and *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018). Pet. 20-21. But neither case has anything to do with Title VII or administrative exhaustion. *John R. Sand* concerned a special statute of limitations in the Court of Federal Claims governing a mining lease claim. *Patchak* involved a statute prohibiting lawsuits regarding land used for Indian gaming.

B. General statutory interpretation principles confirm that the failure-to-exhaust defense is subject to waiver.

The text, structure, and design of Title VII's administrative exhaustion provisions confirm that the requirement is subject to equitable exceptions.

1. In its 2006 *Arbaugh* decision, this Court adopted a plain statement rule: Only where Congress has "clearly state[d]" that a requirement is jurisdictional are waiver and other estoppel arguments foreclosed. 546 U.S. at 515-16. This rule reflects the burdens and "waste of judicial resources" that can arise when a statutory requirement is classified as jurisdictional—namely, that judges are forced to (a) inquire sua sponte into whether the requirement has been satisfied and (b) dismiss cases sometimes years after they have commenced. *Id.* at 504 (internal quotation marks omitted); *see also Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)

(observing that the "consequences that attach to the jurisdictional label" are "drastic"). Only if Congress has expressly signaled its acceptance of these consequences should courts absorb them.

This Court has repeatedly reaffirmed this "clear statement" rule, confirming that statutory requirements are not jurisdictional unless "traditional tools of statutory construction . . . plainly show that Congress imbued a procedural bar with jurisdictional consequences." *United States v. Wong*, 135 S. Ct. 1625, 1632 (2015). Congress need not use "magic words." *Id.* But to preclude the application of waiver or other equitable doctrines, Congress must expressly label a provision "jurisdictional" or otherwise make clear it affects the power of a court. *Id.*

Consequently, petitioner is wrong that statutes setting conditions that must be satisfied before "an action may be brought" are jurisdictional. Pet. 20 (internal quotation marks omitted). For instance, the Copyright Act provides that "*[n]o civil action* for the infringement of the copyright in any United States work *shall be instituted* until preregistration or registration of the copyright claim has been made." 17 U.S.C. § 411(a) (emphasis added). In *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), this Court found this requirement nonjurisdictional. Similarly, the Prison Litigation Reform Act provides that "*[n]o action shall be brought* with respect to prison conditions . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). In *Woodford v. Ngo*, 548 U.S. 81 (2006), this Court held this requirement "is not jurisdictional." *Id.* at 101; *see also Muchnick*, 559 U.S. at 166 n.6 (reiterating this holding). In short, a litigant seeking to establish a statutory requirement as

jurisdictional "must clear a high bar": It must point to express language that not only sets forth a precondition to suit, but that prohibits courts from adjudicating claims absent satisfaction of that precondition. *Wong*, 135 S. Ct. at 1632.

Petitioner cannot make any such showing here. It quotes Section 2000e-5(f)(1), which provides that "a civil action *may be brought* against the respondent named in the [administrative] charge." 42 U.S.C. § 2000e-5(f)(1) (emphasis added); *see also* Pet. 20. But this provision merely dictates when an aggrieved party "may" bring a lawsuit. It makes no mention of when such person *cannot* bring a lawsuit, much less when courts lack the power to hear Title VII claims.

2. The structure of Title VII confirms that exhaustion is not a jurisdictional requirement. In *Muchnick*, this Court deemed a requirement nonjurisdictional in part because it was "not located in a jurisdiction-granting provision" of the statute. 559 U.S. at 166. So too here. Title VII's standalone jurisdictional section is Section 2000e-5(f)(3). The administrative exhaustion requirement resides elsewhere. *See supra* at 8.

Other provisions of Title VII underscore that where Congress wanted to proscribe certain judicial actions, it knew how to do so unambiguously. For instance, Section 2000e-5(g)(2)(A) provides that "[n]o order of the court shall require" that employers rehire or promote individuals under specified circumstances. And Section 2000e-5(g)(2)(B)(ii) provides that where employers make a certain showing, courts "shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment." Even though these provisions do not set jurisdictional limits, they show that Congress

expressly contemplated when to restrict courts' ability to process Title VII claims—and it chose not to deny courts the power to adjudicate those claims absent administrative exhaustion.

3. As Justice Alito recently explained for a unanimous Court, the presumption against foreclosing waiver arguments is especially strong in statutory regimes that are "unusually protective" of claimants. *Henderson*, 562 U.S. at 437 (internal quotation marks omitted). Title VII is such a regime. "[L]aymen, unassisted by trained lawyers, initiate the [Title VII] process." *Zipes*, 455 U.S. at 397 (quoting *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972)). Deeming Title VII's exhaustion requirement jurisdictional would thus be "particularly inappropriate." *Id.* (quoting *Love*, 404 U.S. at 527). It is far better to incentivize defendants to raise exhaustion promptly, so that, if necessary, plaintiffs can amend administrative filings.

Petitioner objects that if the exhaustion requirement is nonjurisdictional, then plaintiffs will "bring their claims directly to court, flooding the federal courts with additional employment litigation." Pet. 23. But this contention ignores the narrow basis for the Fifth Circuit's holding. No one disputes that plaintiffs' claims must be dismissed when defendants raise a meritorious exhaustion defense in a timely manner. That being so, it would be foolhardy for Title VII plaintiffs to gamble on defendants failing to properly raise the failure-to-exhaust defense. After all, employers tend to be sophisticated institutional actors and seldom let procedural errors slide.

II. No court of appeals would have ruled differently from the Fifth Circuit.

Despite this Court's recent efforts to ensure proper use of the term "jurisdictional," lower courts still sometimes mislabel "claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis." *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017) (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010)). In other words, lower courts still often state they are "dismissing 'for lack of jurisdiction' when some threshold fact has not been established, without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction or for failure to state a claim." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006) (internal quotation marks omitted).

Accordingly, it is immaterial whether petitioner can point to court of appeals decisions that simply refer to Title VII's exhaustion requirement as "jurisdictional." Such "drive-by" characterizations "should be accorded no precedential effect" on the real question here: whether the failure-to-exhaust defense can be waived. *Arbaugh*, 546 U.S. at 511 (internal quotation marks omitted). Once the question presented is sharpened in this manner, it becomes clear that there is no circuit split, for no court of appeals holds that the failure-to-exhaust defense cannot be waived.

1. Petitioner acknowledges that "eight circuits" have held that the failure-to-exhaust defense is subject to waiver. Pet. 14. In fact, several Justices on this Court have helped steer the courts of appeals toward

this consensus. Then-Judges Sotomayor and Kavanaugh joined opinions reaching the same conclusion the Fifth Circuit reached here. *See Boos v. Runyon*, 201 F.3d 178, 181-82 (2d Cir. 2000); *Artis v. Bernanke*, 630 F.3d 1031, 1034 n.4 (D.C. Cir. 2011). Then-Judge Gorsuch likewise joined an opinion strongly suggesting the same position. *See Gad v. Kan. State Univ.*, 787 F.3d 1032, 1035-40 (10th Cir. 2015).[2]

2. Petitioner contends that the Fourth, Ninth, and Eleventh Circuits take a contrary view. But these courts, too, have issued decisions recognizing that the failure-to-exhaust defense may be waived. Arguing that other cases from these courts point in the opposite direction, petitioner appears to have fallen prey to the very trap this Court has repeatedly cautioned against: reading passing characterizations of statutory requirements as "jurisdictional" to establish precedent on whether they are subject to waiver.

a. The Fourth Circuit has recognized that Title VII's exhaustion requirement is "subject to waiver, estoppel, and equitable tolling." *Edelman v. Lynchburg Coll.*, 300 F.3d 400, 404 (4th Cir. 2002) (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)). Accordingly, when the employer in *Pueschel v. Peters*, 340 Fed. Appx. 858 (4th Cir. 2009), first raised administrative exhaustion after multiple appeals, the Fourth Circuit held "[w]hatever the

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[2] Petitioner claims that the Eighth Circuit "has yet to pick a side." Pet. 15. But in its only post-*Arbaugh* cases on the issue, that court correctly recognized that a plaintiff's "fail[ure] to exhaust her administrative remedies . . . does not impact our jurisdiction." *Rester v. Stephens Media, LLC*, 739 F.3d 1127, 1130 n.2 (8th Cir. 2014); *see also Gordon v. Shafer Contracting Co.*, 469 F.3d 1191, 1194 (8th Cir. 2006).

merits of the [defendant's] exhaustion argument," it was "waived." *Id.* at 861.

Petitioner cites various Fourth Circuit cases calling the exhaustion requirement "jurisdictional." But none of these cases concerned whether the defense was subject to any equitable exception. In *Davis v. North Carolina Department of Correction*, 48 F.3d 134 (4th Cir. 1995), the Fourth Circuit ordered the district court to dismiss the plaintiff's Title VII claims for failure to exhaust. But the plaintiff offered no reason to excuse that failure, so the court had no occasion to address whether equitable "exceptions" like waiver exist. *Id.* at 140 n.4. The other cases petitioner cites fit the same mold. *See Ruffin v. Lockheed Martin Corp.*, 659 Fed. Appx. 744, 745 n.1, 746-47 (4th Cir. 2016); *Tonkin v. Shadow Mgmt., Inc.*, 605 Fed. Appx. 194, 194-95 (4th Cir. 2015); *Hentosh v. Old Dominion Univ.*, 767 F.3d 413, 415-17 (4th Cir. 2014); *Whitaker v. Nash Cty.*, 504 Fed. Appx. 237, 240 (4th Cir. 2013); *Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 299-301 (4th Cir. 2009). In *Hentosh*, moreover, the plaintiff *had* exhausted her claim. 767 F.3d at 417.

b. The Ninth Circuit takes the same approach: A Title VII defendant "may waive or be estopped from asserting" that the plaintiff did not exhaust administrative remedies prior to filing a Title VII claim. *Stache v. Int'l Union of Bricklayers*, 852 F.2d 1231, 1233 (9th Cir. 1988). Thus, where "equitable conditions" demand it, the Ninth Circuit has long held that courts have the discretion to "excuse" failure to exhaust. *Temengil v. Tr. Territory of Pac. Islands*, 881 F.2d 647, 654 (9th Cir. 1989).

Petitioner contends that in *Sommatino v. United States*, 255 F.3d 704 (9th Cir. 2001), the Ninth Circuit

changed course and held that the exhaustion requirement is not subject to waiver. Pet. 11-12. But far from abrogating *Stache*, *Sommatino* reaffirmed that "the administrative exhaustion requirements under Title VII are not jurisdictional but are conditions precedent to filing an action which a defendant may waive or be estopped from asserting." 255 F.3d at 708 (citing *Stache*, 852 F.2d at 1233). Accordingly, the Ninth Circuit continues to apply equitable principles to debates involving the failure-to-exhaust defense. *See, e.g.*, *Lopez v. Produce Exch.*, 171 Fed. Appx. 11, 14 (9th Cir. 2006); *Kaanapu v. Potter*, 51 Fed. Appx. 244, 247 (9th Cir. 2002).

Petitioner nevertheless fastens on language in *Sommatino* holding that Title VII's requirement to "present[]" a discrimination complaint to "an appropriate administrative agency" is jurisdictional. Pet. 11 (quoting 255 F.3d at 708). So, under *Sommatino*, "equitable remedies are unavailable in federal court when the record shows that no administrative filing was ever made." 255 F.3d at 710.

But because Ms. Davis filed a charge with the appropriate agency, *see* Pet. App. 19a-20a, that restriction on equitable remedies would not apply here. In any event, it is doubtful *Sommatino*'s limited restriction on equitable exceptions remains good law. That decision predated *Arbaugh*'s adoption of the "clear statement" rule. After the announcement of that rule, two circuits reconsidered and abrogated prior law treating Title VII's administrative exhaustion requirement as jurisdictional. *See Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1184 (10th Cir. 2018) (abrogating precedent in part because "*Arbaugh* supports [the] position that exhaustion is not jurisdictional"); *Allen v. Highlands Hosp. Corp.*,

545 F.3d 387, 400 (6th Cir. 2008) (holding that any "assertion that the exhaustion requirement is a jurisdictional prerequisite is no longer accurate in light of the Supreme Court's decision in *Arbaugh*").[3] If presented with the question today, the Ninth Circuit would likely do the same.

c. The Eleventh Circuit agrees the failure-to-exhaust defense is waivable. In *Jackson v. Seaboard Coast Line Railroad Co.*, 678 F.2d 992 (11th Cir. 1982), plaintiffs failed to exhaust administrative remedies, but the Eleventh Circuit ruled that the defendant waived its opportunity to dispute exhaustion by failing to raise the issue until after trial. *Id.* at 1009-11.

Petitioner asserts that *Crawford v. Babbitt*, 186 F.3d 1322 (11th Cir. 1999), abrogated *Jackson*. Pet. 13. But the plaintiff in *Crawford* never advanced—and the Eleventh Circuit never considered—any equitable argument. 186 F.3d at 1327. Nor did any of the other cases petitioner cites raise a question concerning waiver. In *Thomas v. Nicholson*, 263 Fed. Appx. 814 (11th Cir. 2008), the plaintiff pressed no equitable argument. *Id.* at 815 n.1. And in *Peppers v. Cobb County*, 835 F.3d 1289, 1297 (11th Cir. 2016), and *Brown v. Snow*, 440 F.3d 1259, 1264-65 (11th Cir. 2006), the Eleventh Circuit held the plaintiffs had successfully exhausted.

Accordingly, *Jackson* remains binding precedent in the Eleventh Circuit. In *Garner v. G.D. Searle Pharmaceuticals Co.*, 581 Fed. Appx. 782 (11th Cir. 2014), for example, the plaintiff alleged multiple types

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[3] *Allen* decided the issue in the context of the ADEA. 545 F.3d at 401. In *Hill v. Nicholson*, 383 Fed. Appx. 503 (6th Cir. 2010), the Sixth Circuit extended *Allen* to Title VII. *Id.* at 508.

of discrimination under Title VII—but had exhausted only some of those claims with the EEOC. *Id.* at 783-84. Nevertheless, the Eleventh Circuit held the defendant "waived its exhaustion defense by failing to include it in the pretrial order." *Id.* at 784.

3. Finally, petitioner is wrong that the Executive Branch is divided on the question presented. The EEOC takes the position that the Fifth Circuit adopted below. This position is longstanding, extensively considered, and well-explained. *See, e.g.*, Brief of EEOC as Amicus Curiae at 8-13, *Lincoln*, 900 F.3d 1166 (No. 17-3120), 2017 WL 4349417.

Petitioner asserts that the Department of Justice has taken the opposite view. But the language that petitioner plucks from a few briefs simply labels the exhaustion requirement as "jurisdictional"; none of the arguments in those appeals turned on whether the requirement could be waived. Pet. 18-19.

III. The question presented is unimportant.

The question whether employers can waive the defense that a Title VII plaintiff failed to exhaust arises only where (1) the defendant fails to raise the defense in a timely manner and (2) a plaintiff has actually failed to satisfy Title VII's administrative exhaustion requirement. Neither of these conditions occurs with frequency.

1. "Whether the exhaustion requirement is characterized as jurisdictional is important only when the defendant has waived or forfeited the issue." *Pham v. James*, 630 Fed. Appx. 735, 738 (10th Cir. 2015) (internal quotation marks omitted). Given the general competence of employers (and their lawyers), that seldom happens. Indeed, of the eighteen cases

that petitioner cites from supposedly adverse circuits, waiver was at issue in only one. *See Jackson v. Seaboard Coast Line R.R. Co.*, 678 F.2d 992, 1003 (11th Cir. 1982).

2. At any rate, courts rarely find that plaintiffs failed to exhaust their administrative remedies. *See generally* 45C Am. Jur. 2d Job Discrimination § 2009 (2018).

a. To exhaust a Title VII claim, a plaintiff need not perfectly comply with all of the statute's requirements. Instead, all exhaustion requires is a "[g]ood faith effort by the employee to cooperate with the agency and EEOC and to provide all relevant, available information." *Wade v. Sec'y of Army*, 796 F.2d 1369, 1377 (11th Cir. 1986).

For instance, "meeting with an [Equal Employment Opportunity] counselor to resolve a dispute" can suffice. *Brown v. Potter*, 457 Fed. Appx. 668, 672 n.3 (9th Cir. 2011). Similarly, referencing claims on written submissions besides a formal charge document can satisfy the exhaustion requirement. For instance, in *B.K.B. v. Maui Police Department*, 276 F.3d 1091 (9th Cir. 2003), the plaintiff failed to raise a sexual harassment claim in her formal charge, but the court accepted allegations of sexual harassment raised in her "pre-complaint questionnaire" as "evidence that her claim for relief was properly exhausted." *Id.* at 1102; *see also Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1321 (11th Cir. 2001) (intake form sufficient); *Price v. Sw. Bell Tel. Co.*, 687 F.2d 74, 78 (5th Cir. 1982) (unofficial charge that was "neither signed nor sworn" could be sufficient).

Similarly, once plaintiffs have filed charges, they may "clarify and amplify allegations" made in the

original charge and add "additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge." 29 C.F.R. § 1601.12(b). Such amendments need not be in writing or verified. *See, e.g., Agolli v. Office Depot, Inc.*, 548 Fed. Appx. 871, 875 (4th Cir. 2013) (raising new allegations via "continuation sheets" filed after charge).

b. Courts also find plaintiffs to have exhausted any claim "reasonably related" to charges they brought before the EEOC. *Leong v. Potter*, 347 F.3d 1117, 1122 (9th Cir. 2003). For example, in *Gregory v. Georgia Department of Human Resources*, 355 F.3d 1277 (11th Cir. 2004), the plaintiff raised only race and gender-discrimination claims before the EEOC. But she was deemed to have exhausted a retaliation claim too, because the EEOC's investigation of her race and gender claims would have "reasonably uncovered any evidence of retaliation." *Id.* at 1280.

Indeed, a plaintiff who never brought *any* claims before the EEOC can be deemed to have exhausted a claim if it is "reasonably related" to one a different plaintiff exhausted. For example, in *De Medina v. Reinhardt*, 686 F.2d 997 (D.C. Cir. 1982), the plaintiff's "claim was so similar to that made by [her colleague] who had filed an EEOC charge" that the court found that "the purposes of the exhaustion requirement had been served" by the colleague's filing. *Id.* at 1012-13.

c. Finally, courts find the exhaustion requirement is satisfied when an employee's efforts were "hampered by the action of the agency." *Brown v. Snow*, 440 F.3d 1259, 1264 (11th Cir. 2006) (internal quotation marks omitted); *see also Tillbery v. Kent*

Island Yacht Club, Inc., 461 Fed. Appx. 288, 297 (4th Cir. 2012). If, for instance, the plaintiff's theory of the case is not properly recorded due to "negligence of any representative," the plaintiff will be found to have exhausted. *B.K.B.*, 276 F.3d at 1102.

IV. The outcome here does not hinge on whether the failure-to-exhaust defense is subject to waiver.

Even if this Court were to adopt petitioner's proposed rule, the result of this appeal would remain the same. Petitioner argues "[t]here is no serious question that Davis failed to present her religious-discrimination claim to the EEOC." Pet. 23. But the Fifth Circuit expressly left open the possibility that "she did exhaust her administrative remedies." Pet. App. 15a n.5. And for two independent reasons, the Fifth Circuit would likely hold—if forced to reach the issue—that Ms. Davis satisfied Title VII's exhaustion requirement.

1. Ms. Davis sufficiently presented her religious discrimination claim to the relevant administrative agencies. As noted above, material on an "intake questionnaire" or submitted through an amended form can be "considered *part* of the formal charge." *Patton v. Jacobs Eng'g Grp.*, 874 F.3d 437, 443 (5th Cir. 2017); *see also supra* at 20-21. And this Court has held the same in the ADEA context. *See Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 404-06 (2008) (deciding that an EEOC "intake questionnaire" could be "deemed a charge" because it was "reasonably . . . construed to request agency action and appropriate relief on the employee's behalf").

Under this rubric, Ms. Davis exhausted her religious discrimination claim. After filing her initial charges with the TWC, she amended her intake form

to allege that petitioner failed to accommodate her "Religion." ROA 641. That amendment sufficiently presented her religion-based claim to the agency.

2. Even if Ms. Davis did not sufficiently present her religious discrimination claim to the agency, it is still exhausted because it is "reasonably related" to her other claims. A reasonable relation exists where an EEOC investigation of the exhausted claims would have "reasonably uncovered any evidence of" the claims now raised in court. *Gregory v. Ga. Dep't of Human Res.*, 355 F.3d 1277, 1280 (11th Cir. 2004); *see also supra* at 21.

Such is the case here. The TWC's investigation of Ms. Davis's claims—which it continued to pursue after she notified the agency that she had suffered employment harms on the basis of her "[r]eligion"—actually *did* uncover evidence of the events forming the basis of her religious discrimination claim. *See* ROA 653, 659. In fact, petitioner explicitly told the TWC that it terminated Ms. Davis after she missed work for "Church commitments." *Id.*

In short, the question presented is not dispositive here. If this Court ever finds it necessary to consider whether Title VII defendants can waive the failure-to-exhaust defense, it should at least wait for a case in which that question actually matters to the outcome.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 18-525

IN THE
Supreme Court of the United States

FORT BEND COUNTY,
Petitioner,

v.

LOIS M. DAVIS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF CERTIORARI

INTRODUCTION

For more than thirty years, courts have wrestled with whether Title VII's exhaustion requirement is jurisdictional. Circuits have sharply divided on this issue, and acknowledged that they are so divided. Panels *within* Circuits have divided, requiring no fewer than six Circuits, including the court below, to resolve their own internal division on the question. And different components of the Federal Government have been unable to settle on a single position.

In Davis's telling, however, this decades-long debate has been premised on a misunderstanding.

When courts and the Department of Justice have referred to Title VII's exhaustion requirement as "jurisdictional," Davis contends, they were simply engaged in "'profligate' use of that term." Opp. 1. In reality, none of them really meant that exhaustion is an unwaivable requirement. And even if they did (respondent somewhat contradictorily argues) they will soon "reconsider[ ] and abrogate[ ]" that position. Opp. 17.

That argument is as implausible as it sounds. The Circuits that have long deemed Title VII exhaustion a jurisdictional requirement are neither confused nor careless; they have fully acknowledged the serious consequences of this designation. Eight other Circuits, including the panel below, have held otherwise. The time is ripe for this Court to step in and resolve this intractable disagreement.

Respondent's other reasons for opposing review are equally insubstantial. Davis claims that this Court's precedents so clearly support the approach taken by the panel below that certiorari is unnecessary. But her argument is self-refuting: To muster support for her position, Davis must disregard this Court's express statements to the contrary, Opp. 9-10, and distinguish contradictory precedents on the basis of irrelevant factual distinctions, Opp. 10. Davis also contends that the question presented is unimportant. But this Court has time and again emphasized the significance of characterizing a requirement as jurisdictional. And the dozens of appellate opinions that have disputed this particular jurisdictional question are proof in and of themselves of its paramount importance.

A writ of certiorari should be granted.

ARGUMENT

I. THE CIRCUITS ARE INTRACTABLY DIVIDED.

The brief in opposition makes clear that respondent has identified no real basis to contest the circuit split. Rather than start with the split, she begins with a lengthy discussion of the merits. Opp. 6-13. When Davis does finally get there, she does not dispute that three Circuits—the Fourth, the Ninth, and the Eleventh—have held that Title VII's exhaustion requirement is jurisdictional, while eight have held that it is not. Opp. 14-15.

Davis attempts to minimize this conflict by asserting that the Circuits that disagree with the panel below have "mislabel[led]" their own precedents. Opp. 14. Although these courts have repeatedly used the word "jurisdictional," Davis says, in reality they meant that exhaustion is a "claim-processing rule[ ]," subject to equitable defenses such as waiver. Opp. 14-15.

It would be surprising, to say the least, if that were correct. In recent times, this Court has regularly cautioned courts against misuse of the term "jurisdictional," and courts have heeded those warnings. Thus, when the Fourth, Ninth, and Eleventh Circuits have called Title VII's exhaustion requirement "jurisdictional," they have meant it.

1.a. The Fourth Circuit has squarely held more than a dozen times that "a failure by the plaintiff to exhaust administrative remedies concerning a Title VII claim deprives the federal courts of *subject matter jurisdiction* over the claim." *Jones* v. *Calvert Grp., Ltd.*, 551 F.3d 297, 300 (4th Cir. 2009) (empha-

sis added).[1] And it has expressly described the consequences of that rule: Where a Title VII plaintiff "failed to exhaust her administrative remedies * * * the district court ha[s] *no* authority to award judgment on the merits," and "'the *only* function remaining to the court [i]s that of announcing the fact and dismissing the cause[s].'" *Id.* at 301 (emphases added) (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)).

Davis quibbles (at 16) that none of the Fourth Circuit's cases has specifically stated that a failure-to-exhaust defense is not waivable. But it is axiomatic that "a lack of subject matter jurisdiction cannot be waived or forfeited." *United States* v. *Wilson*, 699 F.3d 789, 793 (4th Cir. 2012). District courts in the Fourth Circuit have therefore held that "directly controlling Fourth Court authority" makes clear that an objection for failure to exhaust a Title VII claim "may be raised at any time, including after trial and entry of judgment," and that a court is compelled to consider the objection even if the court would otherwise "deem [it] waived." *Bland* v. *Fairfax Cty.*, 2011 WL 2580343, at *4 & n.2 (E.D. Va. June 29, 2011); *see, e.g.*, *Stewart* v. *Lee*, 243 F. Supp. 3d 722, 728 n.4 (E.D. Va. 2017) (similar).

Davis also claims (at 15) that *Edelman* v. *Lynchburg College*, 300 F.3d 400 (4th Cir. 2002) described Title VII's exhaustion requirement as "'subject to

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[1] *See, e.g.*, *Ruffin* v. *Lockheed Martin Corp.*, 659 F. App'x 744, 746 (4th Cir. 2016) (per curiam) (same); *Mercer* v. *PHH Corp.*, 641 F. App'x 233, 238 (4th Cir. 2016) (same); *Balas* v. *Huntington Ingalls Indus., Inc.*, 711 F.3d 401, 406 (4th Cir. 2013) (same).

waiver, estoppel, and equitable tolling.'" *Id.* at 404 (quoting *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)). That is incorrect. As its citation to *Zipes* suggests, *Edelman* was not discussing Title VII's exhaustion requirement, but rather the requirement that a plaintiff "*timely* file[ ] a charge with the EEOC." *Id.* at 403 (emphasis added). The Fourth Circuit has repeatedly distinguished between filing an untimely administrative claim and never filing a claim with the agency at all: Under *Zipes*, the "failure to timely file an EEOC charge * * * *does not* deprive the district court of subject matter jurisdiction," but a plaintiff's complete failure to present the claim to the agency "deprives the federal courts of subject matter jurisdiction." *Hentosh* v. *Old Dominion Univ.*, 767 F.3d 413, 416-417 (4th Cir. 2014) (emphasis added).

b. The Ninth Circuit has likewise made clear that it views a plaintiff's failure to exhaust as depriving it of subject matter jurisdiction. In *Sommatino* v. *United States*, 255 F.3d 704 (9th Cir. 2001), the Ninth Circuit recognized that the requirement to "file a timely EEOC administrative complaint," is "not jurisdictional." *Id.* at 708. However, it concluded, "where a plaintiff has never presented a discrimination complaint to the appropriate administrative authority, * * * the district court does *not* have subject matter jurisdiction." *Id.* (emphasis added). Thus, the court concluded, "equitable remedies are unavailable in federal court when the record shows that no administrative filing was ever made." *Id.* at 710.

In light of this clear holding, Davis does not even attempt to claim that *Sommatino* was a mere case of

mislabeling. Instead, she contends that *Sommatino*'s holding is limited to the circumstance in which the defendant made "*no* administrative filing," but does not apply where, as here, the defendant failed to exhaust a particular *claim* before the EEOC. Opp. 17 (emphasis added).

Sommatino itself forecloses that reading. It held that " '[t]he jurisdictional *scope* of a Title VII claimant's court action depends upon the *scope* of both the EEOC charge and the EEOC investigation,' " and that a district court "has jurisdiction over any charges of discrimination that are 'like or reasonably related' to the allegations in the EEOC charge." 255 F.3d at 708 (emphases added). Subsequent Ninth Circuit decisions have likewise made clear that subject-matter jurisdiction over a Title VII complaint must be assessed claim-by-claim. *See Curry* v. *Shinseki*, 356 F. App'x 983, 985 (9th Cir. 2009) (finding that the plaintiff properly exhausted one Title VII claim, but that the district court "should have found that it lacked subject matter jurisdiction over [the plaintiff's] non-exhausted Title VII claims"); *see also, e.g.*, *Salas* v. *Indep. Elec. Contractors Inc.*, 603 F. App'x 607, 608 (9th Cir. 2015); *Robinson* v. *Geithner*, 359 F. App'x 726, 729 (9th Cir. 2009).[2]

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[2] Davis contends (at 17) that "the Ninth Circuit continues to apply equitable principles to debates involving the failure-to-exhaust defense." But neither of the two cases Davis cites involved a failure to raise a claim with the EEOC. *See Lopez* v. *Produce Exch.*, 171 F. App'x 11, 13-14 (9th Cir. 2006) (plaintiff allegedly failed to cooperate with EEOC); *Kaapanu* v. *Potter*, 51 F. App'x 244, 247 (9th Cir. 2002) (plaintiff allegedly failed to file timely appeal). And even in those dissimilar circumstances,

Lacking any plausible way of distinguishing *Sommatino*, Davis claims (at 17-18) that she is confident that the Ninth Circuit will "reconsider[ ]" *Sommatino* and its progeny in light of *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006). *Arbaugh*, however, was issued twelve years ago. Since then, the Ninth Circuit has repeatedly reapplied and reaffirmed *Sommatino*'s holding, without a word of dissent. *See, e.g.*, *Salas*, 603 F. App'x at 608 (2015); *Curry*, 356 F. App'x at 985 (2009); *Robinson*, 359 F. App'x at 729 (2009).

c. The Eleventh Circuit has likewise made clear that it deems exhaustion a jurisdictional requirement. In *Crawford* v. *Babbitt*, 186 F.3d 1322 (11th Cir. 1999), the Eleventh Circuit held that exhaustion is "a jurisdictional prerequisite to filing a Title VII action." *Id.* at 1326. And in *Brown* v. *Snow*, 440 F.3d 1259, 1263 (11th Cir. 2006), the court expressly stated that it disagreed with those Circuits that had held that "administrative exhaustion [under Title VII] is not jurisdictional," explaining that "*our precedents say otherwise.*" *Id.* at 1264 (emphasis added).

Davis claims the Eleventh Circuit's view is uncertain because one case from 2014 allegedly deemed an exhaustion defense waived. Opp. 18-19 (citing *Garner* v. *G.D. Searle Pharm. Co.*, 581 F. App'x 782 (11th Cir. 2014) (per curiam)). Again, however, Davis is conflating two different concepts. *Garner* concerned a plaintiff's "fail[ure] to file a *timely* EEOC charge," 581 F. App'x at 784 (emphasis added), whereas *Crawford* and its progeny—like this case—

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neither case applied an equitable defense or even stated that one might be available.

involved a plaintiff's failure to raise a claim before the EEOC *at all*. *See Brown*, 440 F.3d at 1263 (distinguishing untimely filing of an EEOC complaint from plaintiff's "failure to exhaust administrative remedies").

2. Davis does not contest that, in contrast to these three Circuits, eight Circuits have held that Title VII's exhaustion requirement is non-jurisdictional. Opp. 14-15. Nor does she dispute that many of those Circuits had to resolve deep internal divisions of their own. For instance, in *Boos* v. *Runyon*, 201 F.3d 178 (2d Cir. 2000), the Second Circuit documented its longstanding "confusion" on this question and attempted to resolve that disagreement. *Id.* at 182; *see* Opp. 15. Likewise, the Fifth, Sixth, and Seventh Circuits—like the Ninth and the Eleventh—have issued decisions resolving their own internal two- or three-way splits. Pet. 17; *see* Pet. App. 6a-7a.

Indeed, the Eighth Circuit is still internally divided on this question. Pet. 15-16. Davis claims (at 15 n.2) that two Eighth Circuit decisions since *Arbaugh* have characterized the exhaustion requirements as non-jurisdictional. But—once again—those cases concerned the *timeliness* of an EEOC charge, not a plaintiff's failure to file a claim with the EEOC at all, and neither case even cited *Arbaugh*, let alone suggested it overruled the Eighth Circuit's precedents deeming exhaustion jurisdictional. *See Rester* v. *Stephens Media, LLC*, 739 F.3d 1127, 1130 n.2 (8th Cir. 2014); *Gordon* v. *Shafer Contracting Co.*, 469 F.3d 1191, 1194 (8th Cir. 2006). Unsurprisingly, district courts in the Eighth Circuit have also continued to express division on the issue. *See* Pet. 16 n.4.

3. Finally, Davis cannot explain away the Executive Branch's division. As Davis acknowledges (at 19), the EEOC has deemed the exhaustion requirement non-jurisdictional. In contrast, the Department of Justice, including the Solicitor General, has repeatedly argued that the exhaustion requirement is "jurisdictional." Davis suggests that, by using that "label[ ]," the Department did not suggest any view on "whether the requirement could be waived." Opp. 19. But it strains credulity to imagine that the Department of Justice was unaware of that consequence—particularly in cases in which it was specifically urging courts to apply this designation to the exhaustion requirement. *See* Pet. 18-19 & n.5.

II. THE DECISION BELOW IS INCORRECT, AND ONLY THIS COURT CAN PROVIDE THE REQUISITE CLARITY.

Davis's discussion of the merits only confirms the need for this Court's intervention. As Davis concedes (at 9), two decisions of this Court—both issued close in time to the enactment of Title VII—flatly state that Title VII's exhaustion requirement is a "jurisdictional prerequisite[ ]" to suit. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973); *see Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). Davis claims that *Zipes* repudiated that language. But *Zipes* disagreed only with the Court's earlier "references to the timely-filing requirement as jurisdictional," in large part because "as or more often in the same or other cases, we have referred to th[at] provision as a limitations statute." 455 U.S. at 395. *Zipes* said nothing about the characterization of the *exhaustion* requirement as jurisdictional. And Davis has pointed to no case in which the Court has de-

scribed that requirement in non-jurisdictional terms. As lower courts are not free to assume this Court has overruled its prior precedents "by implication," those holdings remain binding. *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997).[3]

What is more, this Court's recent cases have reinforced the fact that Title VII's exhaustion requirement is a "jurisdictional prerequisite." In *Patchak* v. *Zinke*, 138 S. Ct. 897 (2018), the Court described language specifying when an "action" could be "filed or maintained" as "jurisdictional." *Id.* at 905. Title VII's exhaustion provision uses precisely that kind of "jurisdictional language," *id.*, dictating when "*a civil action may be brought* against the respondent named in the charge * * * by the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(f)(1) (emphasis added). Respondent observes (at 10) that *Patchak* involved "Indian gaming" whereas Title VII relates to employment discrimination, but that factual distinction is plainly immaterial to the interpretive question at hand.

Davis also cites a number of other statutory provisions the Court has deemed non-jurisdictional, and claims that those provisions speak in terms similar to Title VII. But before deeming those provisions non-jurisdictional, this Court pointed to some clear textual indication in the statute supporting that

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[3] Contrary to Davis's description, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), merely held that "unnamed class members" did not need to file claims before the EEOC to be afforded "class-based relief." *Id.* at 771. It did not consider the court's subject-matter jurisdiction, or suggest that its holding applied outside the class-action context.

conclusion: either the requirement in question was "subject to [multiple] exceptions," *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 166 (2010), or the statute expressly permitted courts to address the merits "without first requiring" compliance with the rule at issue, *Woodford* v. *Ngo*, 548 U.S. 81, 100 (2006) (quoting 42 U.S.C. § 1997e(c)(2)). Davis has pointed to no similar indication that Title VII's exhaustion requirement is waivable.

Finally, Davis appeals to Title VII's "structure." Opp. 12. But Davis ignores the most relevant structural feature: that the exhaustion requirement exists not "to protect a defendant's case-specific interest" but to achieve the "system-related goal" of ensuring that the EEOC and the Department of Justice can attempt to resolve claims before they proceed to litigation. *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 134 (2008).

III. THIS CASE IS AN IDEAL VEHICLE TO ADDRESS AN IMPORTANT AND WIDELY RECURRING QUESTION.

This case presents an ideal vehicle to resolve the question presented. There is no dispute that the issue was pressed and passed on below in a reasoned opinion. Davis objects (at 22) that the Fifth Circuit did not decide whether she "exhaust[ed] her administrative remedies." But the District Court explained at length why respondent did not even come close to exhausting the religious discrimination claim she now wishes to bring. Pet. App. 29a-37a.

Davis's attempts to relitigate that well-supported holding are meritless. Davis points to the fact that she added the word "religion" to an intake form, but

as the District Court explained, that amended form was not even presented to the EEOC, and her one-word handwritten amendment did not describe even the rudiments of her complaint. Pet. App. 29a-33a. Davis also claims that the agency should have uncovered evidence of her religious discrimination claim in the course of investigating her retaliation and sexual harassment complaint. But the District Court rejected that contention too, observing that the two claims had virtually nothing in common: They involved different individuals, at different times, and concerned different conduct. Pet. App. 33a-35a. And even if this Court found any merit to petitioner's nitpicking, that would not present a vehicle problem: The Fifth Circuit did not decide whether respondent exhausted her administrative remedies because it believed that issue was waived. If this Court holds that exhaustion is jurisdictional—as it should—the Court is free to remand to the Fifth Circuit to consider whether respondent did in fact exhaust.

Davis's attempts to gainsay the importance of the question presented are equally meritless. The decision whether to designate *any* requirement as jurisdictional is of "considerable practical importance." *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 434 (2011). And that is doubly true for Title VII's exhaustion requirement, which is one of the central provisions of one of the most frequently litigated statutes in the U.S. Code.

Davis suggests (at 19) that the issue will hardly ever arise. But the issue *has* arisen in dozens of appellate cases, so much so that it has caused splits between and among the Circuits, and led the Executive Branch to take conflicting views. That is unsur-

prising. Tens of thousands of Title VII charges are brought each year, and every one of those plaintiffs must comply with the statute's exhaustion requirement before suing. Pet. 23. It is of paramount importance for courts and litigants alike to understand whether that requirement is jurisdictional.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 2018

No. 18-525

IN THE
Supreme Court of the United States

FORT BEND COUNTY,
Petitioner,

v.

LOIS M. DAVIS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: OCTOBER 18, 2018
CERTIORARI GRANTED: JANUARY 11, 2019

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Docket No. 16-20640

LOIS M. DAVIS,

Plaintiff-Appellant,

v.

FORT BEND COUNTY,

Defendant-Appellee.

DOCKET ENTRIES

DATE	PROCEEDINGS
09/26/2016	CIVIL RIGHTS CASE docketed. NOA filed by Appellant Ms. Lois M. Davis [16-20640] (RLL) [Entered: 09/26/2016 09:57 AM]
	* * *
12/28/2016	SUFFICIENT APPELLANT'S BRIEF FILED Sufficient Brief deadline satisfied. Paper Copies of Brief due on 01/17/2017 for appellant Lois M. Davis. [16-20640]
	REVIEWED AND/OR EDITED – The original text prior to review appeared as follows: APPELLANT'S BRIEF FILED Additionally the Brief requires

DATE	PROCEEDINGS
	Statement of the Issues needs to be double spaced. Instructions to Attorney: PLEASE READ THE ATTACHED NOTICE FOR INSTRUCTIONS ON HOW TO REMEDY THE DEFAULT. # of Copies Provided: 0 A/Pet's Brief deadline satisfied. Sufficient Brief due on 01/20/2017 for Appellant Lois M. Davis. Appellee's Brief due on 01/27/2017 for appellee Fort Bend County [16-20640] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: APPELLANT'S BRIEF FILED by Ms. Lois M. Davis. Date of service: 12/28/2016 via email - Attorney for Appellants: Hollenbeck, Melkonian; Attorney for Appellees: Morse, Reveles [16-20640] (Raffi Melkonian) [Entered: 12/28/2016 06:55 PM]
12/28/2016	RECORD EXCERPTS FILED. # of Copies Provided: 0 Paper Copies of Record Excerpts due on 01/11/2017 for Appellant Lois M. Davis. [16-20640] REVIEWED AND/OR EDITED – The original text prior to review appeared as follows: RECORD EXCERPTS FILED by Appellant Ms. Lois M. Davis. Date of service: 12/28/2016 via email – Attorney for Appellants:

DATE	PROCEEDINGS
	Hollenbeck, Melknoian; Attorney for Appellees: Morse, Reveles [16-20640] (Raffi Melkonian) [Entered: 12/28/2016 06:57 PM]
	* * *
01/27/2017	SUFFICIENT APPELLEE'S BRIEF FILED # of Copies Provided: 0 Sufficient Brief deadline satisfied. Paper Copies of Brief due on 02/07/2017 for Appellee Fort Bend County. [16-20640] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: APPELLEE'S BRIEF FILED Brief NOT Sufficient as the caption on the cover of the brief does not match the caption of the case, the certificate of service is not dated or signed, and the preliminary notes must be double spaced. Instructions to Attorney: PLEASE READ THE ATTACHED NOTICE FOR INSTRUCTIONS ON HOW TO REMEDY THE DEFAULT. # of Copies Provided: 0 E/Res's Brief deadline satisfied. Sufficient Brief due on 02/13/2017 for Appellee Fort Bend County. Reply Brief due on 02/10/2017 for Appellant Lois M. Davis [16-20640] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: APPELLEE'S BRIEF

DATE	PROCEEDINGS
	FILED by Fort Bend County. Date of service: 01/27/2017 via email - Attorney for Appellants: Hollenbeck, Melkonian; Attorney for Appellees: Morse, Reveles [16-20640] (Randall Weaver Morse) [Entered: 01/27/201707:38PM]
	* * *
02/27/2017	APPELLANT'S REPLY BRIEF FILED Reply Brief deadline satisfied. Paper Copies of Brief due on 03/07/2017 for Appellant Lois M. Davis. [16-20640] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: APPELLANT'S REPLY BRIEF FILED by Ms. Lois M. Davis. Date of service: 02/27/2017 via email - Attorney for Appellants: Hollenbeck, Melkonian; Attorney for Appellees: Morse, Reveles [16-20640] (Raffi Melkonian) [Entered: 02/27/2017 06:17PM]
	* * *

DATE	PROCEEDINGS
10/11/2017	SUPPLEMENTAL AUTHORITIES (FRAP 28j) FILED by Appellant Ms. Lois M. Davis Date of Service: 10/11/2017 via email - Attorney for Appellants: Hollenbeck, Melkonian; Attorney for Appellee: Morse [16-20640] (Raffi Melkonian) [Entered: 10/11/2017 04:02 PM]
10/13/2017	ORAL ARGUMENT HEARD before Judges King, Jones, Elrod. Arguing Person Information Updated for: Raffi Melkonian arguing for Appellant Lois M. Davis; Arguing Person Information Updated for: Randall Weaver Morse arguing for Appellee Fort Bend County [16-20640] (PFT) [Entered: 10/13/2017 10:42 AM]
06/20/2018	PUBLISHED OPINION FILED. [16-20640 Reversed and Remanded] Judge: CDK, Judge: EHJ, Judge: JWE. Mandate issue date is 07/12/2018 [16-20640] (EAB) [Entered: 06/20/2018 09:29AM]
06/20/2018	JUDGMENT ENTERED AND FILED. [16-20640] (EAB) [Entered: 06/20/2018 09:35 AM]

* * *

DATE	PROCEEDINGS
07/05/2018	PETITION for rehearing en banc [8817384-2] Mandate issue date canceled. Paper Copies of Rehearing due on 07/10/2018 for Appellee Fort Bend County. Date of Service: 07/05/2018 [16-20640] REVIEWED AND/OR EDITED - The original text prior to review appeared as follows: PETITION filed by Appellee Fort Bend County for rehearing en banc [8817384-2]. Date of Service: 07/05/2018 via email - Attorney for Appellants: Hollenbeck, Melkonian; Attorney for Appellees: Morse, Reveles [16-20640] (Randall Weaver Morse) [Entered: 07/05/2018 01:17PM]
	* * *
07/20/2018	COURT ORDER denying Petition for rehearing en banc filed by Appellee Fort Bend County [8817384-2]. Without Poll. Mandate issue date is 07/30/2018 [16-20640] (CAG) [Entered: 07/20/2018 08:58AM]
07/30/2018	MANDATE ISSUED. Mandate issue date satisfied. [16-20640] (SBS) [Entered: 07/30/2018 08:10 AM]
	* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Docket No. 4:12-cv-00131

LOIS M. DAVIS,

Plaintiff,

v.

FORT BEND COUNTY,

Defendant.

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
01/13/2012	1	COMPLAINT against Fort Bend County (Filing fee $ 350 receipt number 0541-9115678) filed by Lois M Davis. (Attachments: # 1 Civil Cover Sheet) (Scott, Darryl) (Entered: 01/13/2012)
		* * *

DATE	DOCKET NUMBER	PROCEEDINGS
03/01/2012	6	ANSWER to 1 Complaint with Jury Demand by Fort Bend County, filed. (Reveles, Mary) (Entered: 03/01/2012)
		* * *
01/29/2013	11	First MOTION for Summary Judgment by Fort Bend County, filed. Motion Docket Date 2/19/2013. (Attachments: # 1 Exhibit Dept Org Chart, # 2 Exhibit Newspaper article, # 3 Exhibit Excepts from Pl. Dep., # 4 Affidavit Matere, # 5 Affidavit Webb, # 6 Exhibit Pl. Emp. App., # 7 Proposed Order Proposed Order Granting MSJ) (Reveles, Mary) (Entered: 01/29/2013)

DATE	DOCKET NUMBER	PROCEEDINGS
02/18/2013	12	First RESPONSE to 11 First MOTION for Summary Judgment filed by Lois M Davis. (Attachments: # 1 Proposed Order Plaintiff Proposed Order, # 2 Exhibit exhibit A_Deposition, # 3 Exhibit exhibit B_HR Letter to TWCCD, # 4 Exhibit exhibit C_Letter restricting access, # 5 Exhibit exhibit D_Novosad email, # 6 Exhibit exhibit E_JC move email, # 7 Exhibit exhibit F_Ford affidavit, # 8 Exhibit exhibit G_Mistry Affidavit, # 9 Exhibit Exhibit H_Joseph affidavit, # 10 Exhibit Exhibit I_ Complaint and Right to Sue, # 11 Exhibit exhibit J_ Sexual Harass Inv, # 12 Exhibit exhibit K_ Letter of resignation, # 13 Exhibit exhibit L_Webb Affidavit, # 14 Exhibit exhibit

DATE	DOCKET NUMBER	PROCEEDINGS
		M_Materre affidavit, # 15 Exhibit exhibit N_Defendant response to interrogatories, # 16 Exhibit exhibit O_Kadiri Affidavit, # 17 Exhibit exhibit P_Leveque Affidavit, # 18 Exhibit exhibit Q_TWCCD final decision) (Scott, Darryl) (Entered: 02/18/2013)
02/22/2013	13	REPLY to Response to 11 First MOTION for Summary Judgment, filed by Fort Bend County. (Reveles, Mary) (Entered: 02/22/2013)
		* * *
09/11/2013	16	OPINION AND ORDER granting 11 Motion for Summary Judgment. (Signed by Judge Melinda Harmon) Parties notified. (rvazquez) (Entered: 09/12/2013)

DATE	DOCKET NUMBER	PROCEEDINGS
09/11/2013	17	FINAL JUDGMENT. Case terminated on September 11, 2013 (Signed by Judge Melinda Harmon) Parties notified. (rvazquez) (Entered: 09/12/2013)
		* * *
10/10/2013	19	NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit re: 17 Final Judgment, 16 Order on Motion for Summary Judgment by Lois M Davis (Filing fee $ 455, receipt number 0541-12193745), filed. (Scott, Darryl) (Entered: 10/10/2013)
		* * *
10/31/2014	26	Judgment of USCA re: 19 Notice of Appeal; USCA No. 13-20610. It is ordered and adjudged that the judgment of the District Court is affirmed in part and reversed in part, and the cause is remanded to the District

DATE	DOCKET NUMBER	PROCEEDINGS
		Court for further proceedings, filed. (srussell, 2) (Entered: 10/31/2014)
10/31/2014	27	Opinion of USCA re: 19 Notice of Appeal; USCA No. 13-20610, filed. (srussell, 2) (Entered: 10/31/2014)
		* * *
06/09/2015	37	The petition for a writ of certiorari filed with the Supreme Court has been denied (USCA No. 13-20610) (USSC No. 14-847), filed. (avleal, 1) (Entered: 06/09/2015)
		* * *
09/16/2015	39	First AMENDED COMPLAINT with Jury Demand against Fort Bend County filed by Lois M Davis. Related document: 1 Complaint filed by Lois M Davis. (Melkonian, Raffi) (Entered: 09/16/2015)

DATE	DOCKET NUMBER	PROCEEDINGS
10/06/2015	40	ANSWER to 39 Amended Complaint/Counterclaim/ Crossclaim etc. with Jury Demand by Fort Bend County, filed. (Morse, Randall) (Entered: 10/06/2015)
		* * *
02/26/2016	42	MOTION to Dismiss by Fort Bend County, filed. Motion Docket Date 3/18/2016. (Attachments: # 1 Proposed Order) (Hedges, Kevin) (Entered: 02/26/2016)
		* * *
04/01/2016	49	RESPONSE in Opposition to 42 MOTION to Dismiss, filed by Lois M Davis. (Attachments: # 1 Exhibit, # 2 Exhibit) (Melkonian, Raffi) (Entered: 04/01/2016)
		* * *

DATE	DOCKET NUMBER	PROCEEDINGS
04/12/2016	53	REPLY to Response to 42 MOTION to Dismiss, filed by Fort Bend County. (Morse, Randall) (Entered: 04/12/2016)
		* * *
08/24/2016	59	ORDER AND OPINION re: 42 MOTION to Dismiss. Defendants Motion to Dismiss is GRANTED and Plaintiffs claim of religious discrimination is DISMISSED with prejudice. (Signed by Judge Melinda Harmon) Parties notified. (jdav, 4) (Entered: 08/25/2016)
08/24/2016	60	FINAL ORDER OF DISMISSAL (Signed by Judge Melinda Harmon) Parties notified. (jdav, 4) (Entered: 08/25/2016)

DATE	DOCKET NUMBER	PROCEEDINGS
09/23/2016	61	NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit re: 60 Final Judgment, 59 Order by Lois M Davis (Filing fee $ 505, receipt number 0541-17279752), filed. (Melkonian, Raffi) (Entered: 09/23/2016)
		* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION 4:12-cv-00131

JURY DEMANDED

LOIS DAVIS,

Plaintiff,

vs.

FORT BEND COUNTY,

Defendant.

Filed: Jan. 13, 2012

PLAINTIFF, LOIS DAVIS', ORIGINAL COMPLAINT AND JURY DEMAND

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Lois Davis, hereinafter called Plaintiff, complaining of and about Fort Bend County, hereinafter called Defendant, and for cause of action shows unto the Court the following:

PARTIES AND SERVICE

1. Plaintiff Lois Davis, is a citizen of the United States and the State of Texas and resides in Harris County, Texas.

2. Defendant Fort Bend County may be served by serving its Chief Executive Officer Robert. Hebert with process at the following address: 301 Jackson Street, Richmond Texas 77469.

JURISDICTION

3. The action arises under The Civil Rights Act of 1964, Title VII § 701, 42 U.S.0 §2000e et. seq, as amended by the Civil Rights act of 1991, Title I, §§ 104, 109(a) as hereinafter more fully appears.

4. This Court has supplemental jurisdiction over state law claims discussed below under 28 U.S.C. Section 1367(a) because they arise out of the same case or controversy.

NATURE OF ACTION

5. This is an action under Title 42 U.S.C. Section 2000e et. seq. as amended by the Civil Rights Act of 1991 to correct unlawful employment practices on the basis of retaliation for Plaintiff reporting sexual harassment and religious discrimination.

CONDITIONS PRECEDENT

6. All conditions precedent to jurisdiction have occurred or been complied with the Equal Employment Opportunity Commission. A charge of discrimination was filed with the Equal Employment Opportunity Commission within three-hundred days of the acts complained of herein and Plaintiff's Complaint is filed within ninety days of Plaintiff's

receipt of the Equal Employment Opportunity Commission's issuance of a right to sue letter.

FACTS

7. Plaintiff was first employed by Defendant on or about December 17, 2007 as a Desktop Support Supervisor until she was terminated on or about July 5, 2011.

8. Plaintiff reported directly to Mr. Charles King. However, Charles Cook, the Defendant's IT Director gave Plaintiff additional responsibilities of supervising the Telecommunications technicians, managing research projects, recommending and implementing a new web-based help desk for Defendant.

9. On or about November 2009, Defendant and Charles Cook hired Kenneth Ford as Plaintiff's new manager. Mr. Ford was a personal friend and fellow church member of Mr. Cook prior to his (Mr. Ford) employment with Fort Bend County. Mr. Cook was personally involved and influenced the Defendant to employ Mr. Ford. Mr. Cook and Mr. Ford remained friends and co-workers throughout Mr. Cook's employment at Fort Bend County.

10. Shortly after Plaintiff's employment began, Plaintiff was subjected to constant sexual harassment and assaults by Mr. Charles Cook. These assaults occurred repeatedly over a period of three years. Mr. Cooks' sexual advances included numerous sexual innuendos, inappropriate touching and inappropriate comments of a sexual nature. Those sexual advances and comments included:

a. **In 2008:** Mr. Cook approached Plaintiff while she was in a meeting with a co-worker and

stated to the co-worker, "She has two pair." The co-worker responded, "What two pair?" Mr. Cook replied "spray on jeans." Mr. Cook then walked away.

b. During a meeting, Plaintiff replied to a comment and stated, "I understand, I'm not a little girl." Mr. Cook responded by looking at Plaintiff's buttocks and stating, "No, you are not."

c. During a meeting, Mr. Cook stated "he likes dark chocolate, like the Plaintiff."

d. While standing in Mr. Cook's office, Plaintiff unconsciously adjusted a latch on her skirt and Mr. Cook made the comment, "no thanks, I've already eaten."

e. **In 2009:** During a meeting, Mr. Cook blew a kiss at Plaintiff.

f. During an informal conversation between co-workers, Plaintiff made the comment, "Mr. Cook used to wear a pocket-protector." Mr. Cook responded, "yeah, but she didn't wear a training bra." He also made reference to Plaintiff's buttocks.

g. Plaintiff pulled a grey hair out of her head. Mr. Cook, made the comment, "Don't worry about the gray, unless it's hanging from you thong."

h. After Plaintiff completed her conversation on her blackberry phone, she tried to place the phone in her pocket. Mr. Cook made the comment, "it won't fit, your butt is too big."

i. During a staff meeting, Mr. Cook inappropriately touched the Plaintiff's leg twice.

11. Plaintiff repeatedly asked Mr. Cook to stop, however the inappropriate sexual advances and physical touching did not cease. The vulgarity of the sexual advances increased. Therefore, Plaintiff sought professional counseling and filed a sexual harassment complaint against Mr. Cook on or about April 1, 2010 with Defendant's Human Resources Department. Plaintiff was placed on Family Medical Leave (FMLA) with pay during the investigation. After a meeting with Defendant's management, which included Mr. Ford, Mr. Cook subsequently resigned from Defendant on or about April 22, 2010.

12. On or about May 12, 2010, Plaintiff met with Kenneth Ford and Human Resources to advise them of her intent to return to work. As soon as Plaintiff returned to work, Mr. Ford immediately began retaliating against Plaintiff for filing the complaint for sexual harassment against his friend and colleague, Mr. Cook. Mr. Ford intentionally reduced Plaintiff's responsibilities without explanation. Prior to the sexual harassment complaint, Plaintiff initiated, designed and managed the procurement and implementation of a new Help Desk System. After Plaintiff's return from FMLA and therapy she was removed from the project and Plaintiff's administrative rights[1] were removed.

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[1] Each employee involved with the new Help Desk System is given certain network and computer access to the system. Plaintiff originally had full access to the system. Plaintiff had the right modify, add or delete parameters on the electronic

13. On or about May 21, 2010, Mr. Ford called Plaintiff into his office to reprimand her. Mr. Ford reprimanded Plaintiff for taking an extended lunch break even though Plaintiff took her break at her desk the majority of the time. Mr. Ford is aware that Plaintiff was an exempt employee and he was reminded by Human resources that exempt employees do not have a lunch break policy.

14. Mr. Ford continued to make Plaintiff's work environment hostile. Mr. Ford requested Plaintiff to meet with him every morning for thirty (30) minutes to discuss ongoing projects. This request was not given to any other supervisor. Mr. Ford also superseded Plaintiff's authority by giving direct orders, assigning different projects and tasks to Plaintiff's staff. Mr. Ford malice and retaliation tactics against Plaintiff caused discord and conflict amongst the IT employees including Plaintiff's personal staff.

15. On or about September 21, 2010, Mr. Ford called Plaintiff into his office to give Plaintiff a written warning for failure to complete an assigned task. However, this task was never assigned to Plaintiff. Mr. Ford knew this task was not assigned to Plaintiff; however he continued to reprimand her. Plaintiff contacted Mr. Ford's supervisor and Human Resources about the incident. After Plaintiff complained to Human Resources, the reprimand was removed from her file.

16. On or about March 2011, Defendant began the process of managing the installment of personal

---

system. However, that ability to work on the system was removed prior to her return.

computers (PCs), network components and audio visual equipment into the newly built Fort Bend County Justice Center. All technical support employees were involved with the process. Plaintiff worked for several months on the project. Plaintiff worked more than sixty hours a week. Plaintiff also worked six days a week (without overtime or comp-time)[2] and often on weekends. Plaintiff was not compensated for her comp-time hours despite the fact she was an exempt employee, but was deducted time if she left early due to sickness or family emergencies.

17. On or about April 8, 2011 Kenneth Ford forwarded an email message to all employees that the weekend of July 4, 2011 was a mandatory period for all employees to be present. Kenneth Ford intentionally excluded Plaintiff from that email message.

18. However, on or about June 28, 2011, Plaintiff gave Mr. Ford notice that she would be unavailable for work on Sunday July 3, 2011 due to a previous religious commitment. Plaintiff's Pastor requested that all members participate in this highly anticipated community service event. Plaintiff had specific duties assigned to her for this event. Plaintiff was in charge of the volunteer program that was responsible for feeding over three hundred (300) people. Plaintiff's church depended on her to be there. As a result, Plaintiff made reasonable

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[2] Fort Bend County Policy allows exempt employees to gain comp-time when their hours exceed forty hours (40) or more a week. Comp-time is usually used by employees in lieu of using earned vacation time or sick time.

accommodations for Fort Bend County by having one of her staff members cover her shift. Mr. Ford intentionally and knowingly waited until July 1, 2011 to respond to Plaintiff's request. Mr. Ford informed Plaintiff that if she were absent that day, that would be grounds for a write-up or termination. Mr. Ford intentionally placed Plaintiff in a position whereby she had to choose between her religious commitment and her employment. Plaintiff chose her religious commitment.

19. On or about July 3, 2011 Defendant removed Plaintiff's access to the building and network system. Defendant did not contact Plaintiff of their actions. Plaintiff reported to work on July 4th, but was denied access to her account.

RESPONDEAT SUPERIOR AND RATIFICATION

20. Whenever in this complaint it is alleged that the Defendant, Fort Bend County, did any act or thing, it is meant that the Defendant's officers, agents, servants, employees or representatives did such act and/or that at that time such act was done, it was done with the full authorization or ratification of the Defendant or was done in the normal and routine course and scope of employment of Defendant's officers, agents, servants, employees, or representatives.

RELIGIOUS DISCRIMINATION

21. Defendant, Fort Bend County, by and through Defendant's agents, intentionally engaged in unlawful employment practices involving Plaintiff because she is a devoted Christian.

22. Defendant, Fort Bend County, by and through Defendant's agents, discriminated against Plaintiff in connection with the compensation, terms, conditions and privileges of employment in violation of 42 U.S.C. Section 2000e (2)(a). The effect of these practices has been to deprive Plaintiff of equal employment opportunities and otherwise adversely affect her status as an employee because of her religion.

23. The unlawful employment practices of Defendant, Fort Bend County by and through Defendant's agents, had a disparate and adverse impact on Plaintiff because of her religious observance, practice, or belief.

24. Plaintiff alleges that Defendant, Fort Bend County by and through Defendant's agents, discriminated against Plaintiff on the basis of religion with malice or with reckless indifference to the protected rights of Plaintiff.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BY FORT BEND COUNTY

25. Fort Bend County intentionally and recklessly cause Plaintiff to suffer physical and emotional damage. Defendant was aware of its Agent's ongoing sexual harassment and retaliation acts against Plaintiff. Defendant remedied the situation by wrongfully terminating Plaintiff based on religion. Defendant's conduct was extreme and outrageous and proximately caused Plaintiff severe emotional distress. Plaintiff suffered damages for which Plaintiff herein sues.

RETALIATION BY FORT BEND COUNTY

26. Plaintiff alleges that Fort Bend County instituted a campaign of retaliation which included:

* demoting and removing Plaintiff from projects she managed,
* intentionally reprimanding Plaintiff for acts she did not commit,
* docking her pay, even though she is an exempt employee,
* requiring her perform task that no other manager in her position were required to perform

This retaliation was and is due to Plaintiff exercising her rights by reporting sexual assault charges to human resources. Plaintiff suffered damages for which Plaintiff herein sues.

DAMAGES

27. Plaintiff sustained the following damages as a result of the actions and/or omissions of Defendant described hereinabove:

a. All reasonable and necessary Attorney's fees incurred by or on behalf of Plaintiff,
b. All reasonable and necessary costs incurred in pursuit of this suit,
c. Emotional pain,
d. Expert fees as the Court deems appropriate,
e. Front pay in an amount the Court deems equitable and just to make Plaintiff whole,
f. Mental anguish,
g. Humiliation,

h. Physical discomfort

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff, Lois Davis, respectfully pray that the Defendant be cited to appear and answer herein, and that upon a final hearing of the cause, judgment be entered for the Plaintiff against Defendant for damages in an amount within the jurisdictional limits of the Court; exemplary damages together with interest as allowed by law; costs of court; and such other and further relief to which the Plaintiff may be entitled at law or in equity.

Respectfully Submitted.

/s/ Darryl E. Scott
DARRYL E. SCOTT
Attorney for Petitioner
State Bar No.: 24075045
Southern District Bar No:: 1138469
3730 KIRBY DR. SUITE 1200
office: 713.534.7224
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/s/ Jessica R. Alexander
JESSICA R. ALEXANDER
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PLAINTIFF HEREBY DEMANDS TRIAL BY JURY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION 4:12-CV-00131

DEFENDANT DEMANDS A JURY

LOIS M. DAVIS,

Plaintiff,

v.

FORT BEND COUNTY,

Defendant.

Filed: Mar. 1, 2012

DEFENDANT, FORT BEND COUNTY'S, ORIGINAL ANSWER AND RESPONSE TO ALLEGATIONS

TO THE HONORABLE JUDGE OF SAID COURT:

Come now FORT BEND COUNTY, TEXAS, Defendant herein, hereby makes and files its Original Answer, made in response to the various allegations as set forth in Plaintiff's Original Complaint [Docket No. 1] and would respectfully show the following:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

FORT BEND COUNTY, TEXAS, as a political subdivision of the State of Texas, is entitled to and does hereby invoke sovereign governmental immunity and/or statutory exemptions, exclusions, and exceptions from liability, and limitations on liability.

Third Defense

Any disciplinary actions directed at Plaintiff were the result of unsatisfactory job performance.

Fourth Defense

The Plaintiff's discharge from her employment was not the result of any discriminatory intent, nor was it the result of any discriminatory effect, but rather was due to the legitimate interests of Fort Bend County.

Fifth Defense

In regard to the punitive damages sought by Plaintiff, if any, the Defendant may not be held liable for punitive damages.

Sixth Defense

The Defendant has not committed any willful violation of law.

Seventh Defense

The Plaintiff has failed to mitigate her damages, if any, sustained herein.

I.

ANSWER TO PLAINTIFF'S ALLEGATIONS

Subject to the above and foregoing Defenses, without waiving same but instead expressly insisting thereon, the Defendant answers the various allegations made by the Plaintiff as follows:

Answers to Plaintiff's Allegations in the Original Complaint

1. Plaintiff's Paragraph 3: The Defendant admits that jurisdiction may be invoked under 42 USC 2000e et. seq; however; Defendant contends that Plaintiff can neither plead nor prove any facts which would establish any valid federal, constitutional, and/or civil rights claim for relief against Defendant.

2. Plaintiff's Paragraph 4: The Defendant admits that jurisdiction may be invoked under 28 USC 1367(a); however; Defendants contend that Plaintiff can neither plead nor prove any facts which would establish any valid state, federal, constitutional, and/or civil rights claim for relief against Defendants. Subject to the above and foregoing, and without waiving same but instead expressly insisting thereon, Defendant maintains that Plaintiff has failed to comply with Section 89.004 of the Texas Local Government Code, entitled "Presentation of Claim." Section 89.004 of the Texas Local Government Code provides that:

(a) Except as provided by Subsection (c), a person *may not file suit* on a claim against a county or an elected or appointed county official in the official's capacity as an appointed or elected official unless the person has presented the claim to the

commissioners court and the commissioners court neglects or refuses to pay all or part of the claim *before the 60th day after the date of the presentation of the claim*.

(b) If the plaintiff in a suit against a county does not recover more than the commissioners court offered to pay on presentation of the claim, the plaintiff shall pay the costs of the suit.

(c) A person may file a suit for injunctive relief against a county. After the court's ruling on the application for temporary injunctive relief, any portion of the suit that seeks monetary damages *shall be abated until* the claim is presented to the commissioners court and the commissioners court neglects or refuses to pay all or part of the claim by *the 60th day after the date of the presentation of the claim*. V.T.C.A., Local Government Code § 89.004 (emphasis added).

Plaintiff has failed to comply with V.T.C.A., Local Government Code § 89.004, and thus is barred from any relief under state law.

3. Plaintiff's Paragraph 5: No responsive pleading is required as to the alleged nature of any claim asserted as being made by the Plaintiff in her lawsuit. In the alternative, Defendant denies that Plaintiff is entitled to any relief sought under the claims asserted as being made in this lawsuit. Specifically, Defendant denies that the Plaintiff is entitled to any relief as a result of any alleged discriminatory employment practice.

4. Plaintiff's Paragraph 6: The Defendant does not have sufficient knowledge or information, after reasonable inquiry, to admit or deny whether the

Plaintiff has compiled with the conditions precedent to jurisdiction in this matter; Defendant admits that Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission.

5. Plaintiff's Paragraph 7: Defendant admits that the Plaintiff was employed on or about December 17, 2007, but denies that Plaintiff was hired as a "Desktop Support Supervisor." Defendant admits Plaintiff was terminated on or about July 5, 2011.

6. Plaintiff's Paragraph 8: Defendant admits Plaintiff reported to Charles King. Defendant is without sufficient knowledge or information, after reasonable inquiry, to admit or deny the remaining allegations in this paragraph.

7. Plaintiff's Paragraph 9: Defendant admits Defendant hired Kenneth Ford on or about November 2009. Defendant admits Kenneth Ford and Charles Cook attended the same church. Defendant denies the remaining allegations of this paragraph.

8. Plaintiff's Paragraph 10: Defendant is without sufficient knowledge or information, after reasonable inquiry, to admit or deny the allegations contained in this paragraph.

9. Plaintiff's Paragraph 10(a): Defendant is without sufficient knowledge or information, after reasonable inquiry, to admit or deny the allegations contained in this paragraph.

10. Plaintiff's Paragraph 10(b): Defendant is without sufficient knowledge or information, after reasonable inquiry, to admit or deny the allegations contained in this paragraph.

11. Plaintiff's Paragraph 10(c): Defendant is without sufficient knowledge or information, after reasonable inquiry, to admit or deny the allegations contained in this paragraph.

12. Plaintiff's Paragraph 10(d): Defendant is without sufficient knowledge or information, after reasonable inquiry, to admit or deny the allegations contained in this paragraph.

13. Plaintiff's Paragraph 10(e): Defendant is without sufficient knowledge or information, after reasonable inquiry, to admit or deny the allegations contained in this paragraph.

14. Plaintiff's Paragraph 10(f): Defendant is without sufficient knowledge or information, after reasonable inquiry, to admit or deny the allegations contained in this paragraph.

15. Plaintiff's Paragraph 10(g): Defendant is without sufficient knowledge or information, after reasonable inquiry, to admit or deny the allegations contained in this paragraph.

16. Plaintiff's Paragraph 10(h): Defendant is without sufficient knowledge or information, after reasonable inquiry, to admit or deny the allegations contained in this paragraph.

17. Plaintiff's Paragraph 10(i): Defendant is without sufficient knowledge or information, after reasonable inquiry, to admit or deny the allegations contained in this paragraph.

18. Plaintiff's Paragraph 11: Defendant is without sufficient knowledge or information, after reasonable inquiry, to admit or deny the allegations contained in the first and second sentence in this

paragraph. Defendant admits Plaintiff filed a complaint against Mr. Cook on or about April 1, 2010. Defendant admits Plaintiff was placed on paid leave pending an investigation of the allegations against Mr. Cook. Defendant admits Mr. Cook resigned from employment with Defendant on or about April 22, 2010. Defendant denies Mr. Kenneth Ford participated in any meetings regarding the allegations against Mr. Cook.

19. Defendant's Paragraph 12: Defendant admits the first sentence in this paragraph. Defendant denies the allegations contained in the second, third and fourth sentence in this paragraph. Defendant admits the last sentence of this sentence.

20. Defendant's Paragraph 13: Defendant admits the first and second sentence in this paragraph. Defendant denies the remainder of this paragraph.

21. Defendant's Paragraph 14: Defendant denies the first and fifth (last) sentence in this paragraph. Defendant admits the second, third and fourth sentence in this paragraph.

22. Defendant's Paragraph 15: Defendant admits the first and third sentence in this paragraph. Defendant denies the second and third sentence in this paragraph. Defendant admits the fourth sentence in this paragraph. Defendant denies the fifth (last) sentence in this paragraph.

23. Defendant's Paragraph 16: Defendant admits the first, second and third sentence in this paragraph. Defendant is without sufficient knowledge or information, after reasonable inquiry, to admit or deny remaining sentences in this paragraph.

24. Defendant's Paragraph 17: Defendant admits the first sentence of this paragraph. Defendant denies the second sentence of this paragraph.

25. Defendant's Paragraph 18: Defendant admits the first, eighth and tenth sentence of this paragraph. Defendant is without sufficient knowledge or information, after reasonable inquiry, to admit or deny the second, third, fourth, fifth, sixth sentence contained in this paragraph. Defendant denies the seventh and ninth sentence contained in this paragraph.

26. Defendant's Paragraph 19: Defendant admits the first and second sentence of this paragraph. Defendant is without sufficient knowledge or information, after reasonable inquiry, to admit or deny the last sentence contained in this paragraph.

27. Defendant's Paragraph 20: Defendant is unable to admit or deny the allegations contained in this paragraph for the reason that same are vague and ambiguous. Alternatively, Defendants incorporate by reference herein its responses made to Plaintiff's Paragraphs 3-20, including all subparagraphs, if any, respectively.

28. Defendant's Paragraph 21: Defendant denies the allegations contained in this paragraph.

29. Defendant's Paragraph 22: Defendant denies the allegations contained in this paragraph.

30. Defendant's Paragraph 23: Defendant denies the allegations contained in this paragraph.

31. Defendant's Paragraph 24: Defendant denies the allegations contained in this paragraph.

32. Defendant's Paragraph 25: Defendant denies the allegations contained in this paragraph.

33. Defendant's Paragraph 26: Defendant denies the allegations contained in this paragraph.

34. Defendant's Paragraph 27: Defendant denies that Plaintiff is entitled to any relief sought in this paragraph and all subparagraphs.

35. Final paragraph (not numbered by Plaintiff): Defendant denies that Plaintiff is entitled to any of the relief required in her prayer paragraph, and the Defendant denies that Plaintiff is entitled to any relief.

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully prays that any and all relief demanded in Plaintiff's Original Complaint [Docket No. 1] be in all respects denied, with all costs assessed against Plaintiff, and for such other and further relief to which Defendant may be entitled.

Respectfully submitted,

ROY L. CORDES, Jr.
Fort Bend County Attorney

By: */s/ Mary E. Reveles*
Mary E. Reveles
First Assistant County Attorney
SBN: 24007905
Federal ID No. 23788
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Richmond, Texas 77469
(281) 341-4555
(281) 341-4557 - Facsimile
ATTORNEY FOR FORT BEND COUNTY

CERTIFICATE OF SERVICE

I hereby certify (1) that the above instrument is being filed electronically, with confirmation to be received that the Electronic Court Filing ("ECF") system has registered such transaction, and with a listing of all attorneys who have received notice of electronic filing of the above instrument, and (2) that the above instrument is being sent by certified mail, return receipt requested, to all known counsel of record, or parties appearing *pro se*, who are not listed as having received such notice of electronic filing of the above instrument; and that both such actions are being done on this, the 1st day of March, 2012.

/s/ Mary E. Reveles
Mary E. Reveles,
First Assistant County Attorney

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION 4:12-CV-131

JURY TRIAL DEMANDED

LOIS M. DAVIS

v.

FORT BEND COUNTY

Filed: Sept. 16, 2015

PLAINTIFF'S FIRST AMENDED COMPLAINT AND JURY DEMAND

NOW COMES Lois Davis, hereinafter called Plaintiff, complaining of and about Fort Bend County, hereinafter called Defendant, and for cause of action shows unto the Court the following:

PARTIES AND SERVICE

1. Plaintiff Lois M. Davis, is a citizen of the United States and the State of Texas and resides in Harris County, Texas.

2. Defendant Fort Bend County may be served by serving its Chief Executive Officer with process at the following address: 301 Jackson Street, Richmond Texas 77469.

JURISDICTION

3. This Court has federal question jurisdiction because the action arises under the Civil Rights Act of 1964, Title VII § 701, 42 U.S.C § 2000e, et. seq, as amended by the Civil Rights act of 1991, Title I, §§ 104, 109(a).

NATURE OF ACTION

4. This is a religious discrimination case arising under Title VII. The district court previously granted summary judgment to Fort Bend County on all of Ms. Davis's claims. That decision was reversed, in part, by the United States Court of Appeals for the Fifth Circuit. *See Davis v. Fort Bend County*, 765 F.3d 480 (5th Cir. 2014). This Amended Complaint conforms the active pleadings in this case to those remanded by the decision of the Fifth Circuit. Specifically, Ms. Davis hereby abandons those claims that the Fifth Circuit found were not properly pleaded—specifically, her claims for Intentional Infliction of Emotional Distress under Texas law and Retaliation under Title VII, and she reasserts her remaining claims for religious discrimination under Title 42 U.S.C. § 2000e *et. seq*.

CONDITIONS PRECEDENT

5. All conditions precedent to jurisdiction have occurred or have been complied with in the Equal Employment Opportunity Commission (EEOC). A charge of discrimination was filed with the EEOC within three hundred days of the acts complained of herein and Plaintiff's Original Complaint was filed within ninety days of Plaintiff's receipt of the EEOC's issuance of a right to sue letter.

FACTS

6. Fort Bend County hired Lois M. Davis in December 2007 as a Desktop Support Supervisor responsible for supervising about fifteen information technology ("IT") technicians. Charles Cook was Fort Bend's IT Director at the time.

7. On or about November 2009, Defendant and Cook hired Kenneth Ford as Plaintiff's new manager. Ford was a personal friend and fellow church member of Cook prior to his employment with Fort Bend County. Cook was personally involved and influenced the Defendant to employ Ford. Cook and Ford remained friends and co-workers throughout Cook's employment at Fort Bend County.

Cook sexually harasses Ms. Davis throughout 2008 and 2009.

8. Cook began to sexually harass Ms. Davis almost immediately after she began work at Fort Bend. This harassment occurred repeatedly over a period of three years. Cook's sexual advances included numerous sexual innuendos, inappropriate touching, and inappropriate comments of a sexual nature. Those sexual advances and comments included the following:

a. **In 2008:** Mr. Cook approached Plaintiff while she was in a meeting with a co-worker and stated to the co-worker, "She has two pair." The co-worker responded, "What two pair?" Mr. Cook replied "spray on jeans." Mr. Cook then walked away.

b. During a meeting, Plaintiff replied to a comment and stated, "Understand, I'm not a little girl." Mr. Cook responded by looking at

Plaintiff's buttocks and stating, "No, you are not.

c. During a meeting, Mr. Cook stated he "likes dark chocolate, like [the Plaintiff]."

d. While standing in Mr. Cook's office, Plaintiff unconsciously adjusted a latch on her skirt and Mr. Cook made the comment, "No thanks, I've already eaten."

e. **In 2009:** During a meeting, Mr. Cook blew a kiss at Plaintiff.

f. During an informal conversation between co-workers, Plaintiff made the comment, "Mr. Cook used to wear a pocket-protector," Mr. Cook responded, "Yeah, but she didn't wear a training bra." He also made reference to Plaintiff's buttocks.

g. Plaintiff pulled a grey hair out of her head. Mr. Cook, made the comment, "Don't worry about the gray, unless it's hanging from your thong."

h. After Plaintiff completed a conversation on her mobile telephone, she tried to place the phone in her pocket. Mr. Cook made the comment, "It won't fit, your butt is too big."

i. During a staff meeting, Mr. Cook inappropriately touched the Plaintiff's leg twice.

9. Ms. Davis repeatedly asked Cook to stop. However the inappropriate sexual advances, comments, and physical touching did not cease. The vulgarity of the sexual advances increased until

Ms. Davis was no longer able or willing to tolerate Cook's attacks.

Ms. Davis complains about the sexual harassment by Cook. Cook is investigated and resigns.

10. On or about April 1, 2010, Davis filed a complaint with Fort Bend County's Human Resources Department, alleging that Cook subjected her to constant sexual harassment and assaults soon after her employment began. Fort Bend County placed Davis on Family Medical Leave Act ("FMLA") leave during its investigation of her complaint. The investigation substantiated Davis's allegations against Cook and ultimately led to Cook's resignation on April 22, 2010.

11. Kenneth Ford was Ms. Davis's supervisor after Cook's resignation.

Ms. Davis returns to work and is retaliated against by Ford.

12. On or about May 12, 2010, Plaintiff met with Kenneth Ford and Human Resources and advised them of her intent to return to work. After Ms. Davis returned to work, Ford immediately began retaliating against her for having caused the termination of his friend, Cook. Ford effectively demoted Plaintiff by reducing the number of her direct reports from fifteen to four; removed her from projects she had previously managed; superseded her authority by giving orders and assigning different projects and tasks directly to Davis's staff; removed her administrative rights from the computer server; and assigned her tasks that other similarly situated employees were not required to perform.

13. For example, on or about May 21, 2010, Ford called Ms. Davis into his office to reprimand her. Ford reprimanded Ms. Davis for taking an extended lunch break even though she took her break at her desk the majority of the time. Ford was aware that Ms. Davis was an exempt employee and he was reminded by Human Resources that exempt employees do not have a lunch break policy.

14. Additionally, Ford required Ms. Davis to meet with him every morning for thirty minutes to discuss ongoing projects. This demand was not made of any other supervisor. Ford also superseded Ms. Davis's authority by giving direct orders to, and assigning different projects and tasks to her staff. Ford's retaliation tactics against Ms. Davis caused discord and conflict amongst the IT employees including, Ms. Davis's personal staff.

15. Moreover, on or about September 21, 2010, Ford called Ms. Davis into his office to give her a written warning for failing to complete an assigned task. However, the task at issue was never assigned to Ms. Davis. Moreover, Ford knew this task was not assigned to Ms. Davis, but nonetheless insisted on reprimanding her. Ms. Davis contacted Ford's supervisor and Human Resources about the incident. After Ms. Davis complained to Human Resources, the reprimand was removed from her file.

16. Ford intentionally reduced Ms. Davis's responsibilities without explanation. Prior to the sexual harassment complaint, for instance, Ms. Davis had initiated, designed, and managed the procurement and implementation of a new Help Desk System. After her return from FMLA and

therapy, she was removed from the project and all of her administrative rights[1] were removed.

Ms. Davis seeks a religious accommodation for a few hours on Sunday, July 3, 2011, and is terminated for practicing her religion.

17. Ms. Davis is a devout Christian. She is an active member of the Church Without Walls, a thriving Christian community in the Houston area. Ms. Davis expresses her religious beliefs, in part, by attending services at the Church. Ms. Davis attends both the 8:00 am and 10:00 am church services at the Church Without Walls every Sunday. In addition, Ms. Davis attends Tuesday night Bible studies, and is involved in many other religious activities affiliated with the Church. For example, Ms. Davis has an important role in Church administration. All of those actions are directly motivated and required by Ms. Davis's personal religious faith.

18. In March 2011, Fort Bend told its staff that it was embarking on a major project to install personal computers, network components, and audiovisual equipment into the newly built Fort Bend County Justice Center. The Justice Center was ultimately scheduled to open on July 4, 2011, which was a Monday.

19. Davis worked tirelessly on the Justice Center project beginning in March 2011. Ms. Davis worked

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[1] Each employee involved with the new Help Desk System was given network and computer access to the system. Plaintiff originally had full access to the system, and could modify, add, or delete parameters on the electronic system. However, the ability to work on that system was removed prior to her return, on Ford's directive.

more than sixty hours a week, including up to six days a week (without overtime or comp-time),[2] often on weekends and well into many evenings. Ms. Davis was not compensated for her comp-time hours, despite the fact that she was an exempt employee, but was deducted time if she left early due to sickness or family emergencies. Ms. Davis attended church throughout this time of intense work. No representative of Fort Bend County stated at any time that she (or any other employee) would be punished if she took a few hours off to fulfill her religious obligations.

20. In June 2011, Ford informed his staff that they would be required to be available to work during the weekend July 2-3, 2011. On June 28, 2011, Ms. Davis informed Ford that she would not be available to work the morning of Sunday, July 3, 2011 due to a religious obligation at her church. This obligation consisted not only of a church service, which Ms. Davis was required to attend under her understanding of her religious faith, but also included a special service about which Ms. Davis felt a special religious obligation to attend. July 3, 2011 was the date her church had planned the groundbreaking of a new church building and a meal served to the community to celebrate that solemn occasion, in addition to a traditional church service. Ms. Davis made clear to Fort Bend County that she would arrange for a substitute to take on her job

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[2] Fort Bend County's policies permit exempt employees to accrue comp-time when their hours exceed forty (40) or more per week. Comp-time may be used by employees for time off, in lieu of using their accrued vacation time or sick time.

responsibilities during her absence that day, as she normally did in similar circumstances.

21. Ford initially indicated to Ms. Davis that she could attend the July 3rd church service. However, Ford later changed course and told Ms. Davis that she would be disciplined if she fulfilled her religious obligations rather than coming to work the morning of July 3rd. Ford told Ms. Davis that her offers to find a substitute and to return to work immediately after the service was completed were inadequate, and that she would face discipline no matter what alternatives she gave to Ford. As a result, Ford intentionally placed Ms. Davis in a position forcing her to choose between her religious beliefs, obligations, and commitment on the one hand, and her employment on the other. Ms. Davis chose to honor her personal religious beliefs and commitment.

22. Ms. Davis did not go to work on July 3, 2011. True to Ford's threats, Ms. Davis was terminated from employment with Fort Bend County immediately as a result. Ms. Davis's computer access and access to her workplace were disabled on Sunday. She was subsequently "officially" terminated on July 6, 2011.

23. The Fort Bend County Justice Center opened on time and without incident on Monday, July 4, 2011. In fact, Fort Bend County's employees were dismissed early on Sunday, July 3rd because they were not needed to complete any remaining work.

RESPONDEAT SUPERIOR AND RATIFICATION

24. Whenever in this complaint it is alleged that the Defendant, Fort Bend County, did any act or

thing, it is meant that the Defendant's officers, agents, servants, employees or representatives did such act and that, at that time such act was done, it was done with the full authorization or ratification of the Defendant or was done in the normal and routine course and scope of employment of Defendant's officers, agents, servants, employees, or representatives.

RELIGIOUS DISCRIMINATION

25. Ms. Davis hereby re-alleges paragraphs 1-24 of this Amended Complaint.

26. Ms. Davis possessed a sincere religious belief that she was obligated to attend church, by her own personal view of her religious faith, on July 3, 2011.

27. On June 28, 2011, Ms. Davis told Ford about her religious obligation and need to attend the church service, and made clear that this need was motivated and required by her religious faith. Specifically, Ms. Davis stated that she was required to attend a special church service on that date at which her congregation would break ground on a new church and feed the community. At that time, neither Ford, nor any other representative of Fort Bend County, disputed the sincerity of Ms. Davis's religious beliefs, or dispute that her request was motivated by religion.

28. Ms. Davis told Ford that her church service was likely only going to take a few hours, and that she was willing to return to work that Sunday immediately after the church service in order to continue her work. Ms. Davis also arranged for a replacement during her absence, Ms. JoAnn Cosbey.

29. Although Ford initially gave Ms. Davis his approval—Ford gave her a "thumb's up" sign and told Ms. Davis that she had "really stepped up"—he ultimately rejected Ms. Davis's request for a few hours off to attend the church service. Ford offered no accommodation for Ms. Davis's request, and he rejected her proposal that she come to work immediately after the church service.

30. Ford told Ms. Davis that she should not come to work at all on July 3rd if she did not report to work first thing that morning, and Ford told her that she would be subject to discipline if she did not did so.

31. Ford gave no specific reason why Ms. Davis's request for accommodation was denied, despite the fact that other employees had been given time off for personal, non-religious, reasons (such as to attend a July 4th parade).

32. When Ms. Davis chose to attend church rather than report to work the morning of July 3rd, Ford immediately acted to terminate her employment by cutting off her access to the Fort Bend County campus and by terminating her e-mail account. She was later "officially" terminated on July 6, 2011.

33. The Fort Bend County Justice Center opened on time and without incident on July 4, 2011. Fort Bend County suffered no hardship by Ms. Davis's absence, much less any "undue" hardship; nor would it have suffered any hardship had it simply accommodated Ms. Davis's request for several hours off from work.

34. Defendant, Fort Bend County, by and through Defendant's agents, intentionally engaged in

unlawful employment practices involving Plaintiff because she is a devoted Christian. Fort Bend's decision to terminate Ms. Davis, in addition to being a violation of Title VII, was consistent with the campaign of retaliation undertaken by Fort Bend against Ms. Davis from the time she returned from FMLA leave.

35. Defendant, Fort Bend County, by and through Defendant's agents, discriminated against Plaintiff in connection with the compensation, terms, conditions, and privileges of her employment in violation of 42 U.S.C. § 2000e (2)(a). The effect of these practices has been to deprive Plaintiff of equal employment opportunities and otherwise adversely affect her status as an employee because of her religion.

36. The unlawful employment practices of Defendant, Fort Bend County by and through Defendant's agents, had a disparate and adverse impact on Plaintiff because of her religious observances, practices, or beliefs.

37. Plaintiff alleges that Defendant, Fort Bend County by and through Defendant's agents, discriminated against Plaintiff on the basis of religion with malice or with reckless indifference to the protected rights of Plaintiff.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BY FORT BEND COUNTY (ABANDONED)

38. Fort Bend County intentionally and recklessly caused Plaintiff to suffer physical and emotional damage. Defendant was aware of its Agent's ongoing sexual harassment and retaliation acts against

Plaintiff. Defendant remedied the situation by wrongfully terminating Plaintiff based on religion. Defendant's conduct was extreme and outrageous and proximately caused Plaintiff severe emotional distress. Plaintiff suffered damages for which Plaintiff herein sues.

39. Davis is no longer pursuing this Count of the original Complaint, pursuant to the Fifth Circuit's opinion in *Davis v. Fort Bend*, 765 F.3d 480 (5th Cir. 2014).

RETALIATION BY FORT BEND COUNTY (ABANDONED)

40. Plaintiff alleges that Fort Bend County instituted a campaign of retaliation which included:

* demoting and removing Plaintiff from projects she managed,
* intentionally reprimanding Plaintiff for acts she did not commit,
* docking her pay, even though she is an exempt employee,
* requiring her perform task that no other manager in her position were required to perform

This retaliation was and is due to Plaintiff exercising her rights by reporting sexual assault charges to human resources. Plaintiff suffered damages for which Plaintiff herein sues.

41. Davis is no longer pursuing this Count of the original Complaint, pursuant to the Fifth Circuit's opinion in *Davis v. Fort Bend*, 765 F.3d 480 (5th Cir. 2014).

DAMAGES

42. Plaintiff has sustained and will continue to sustain the following damages as a direct result of the actions and or omissions of Defendant described hereinabove:

a. Front pay and back pay in an amount deemed equitable and just to make Plaintiff whole;

b. Mental anguish, emotional pain, and humiliation;

c. Physical discomfort;

d. Exemplary damages;

e. All reasonable and necessary attorney's fees incurred by or on behalf of Plaintiff;

f. All reasonable and necessary costs incurred in pursuit of this suit, including expert witness fees;

g. Taxable court costs, and pre- and post-judgment interest;

h. All other damages to which Ms. Davis may be entitled.

JURY DEMAND

Plaintiff hereby demands a trial by jury.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff, Lois Davis, respectfully prays that the Defendant be cited to appear and answer herein, and that upon a final hearing of the cause, judgment be entered for the Plaintiff against Defendant for damages in an amount within the jurisdictional limits of the Court, together with interest as allowed

by law and costs of court. Plaintiff further requests any and all such other relief to which the Plaintiff may be entitled at law or in equity.

Dated: September 16, 2015

Respectfully submitted,
WRIGHT & CLOSE LLP

By: */s/ Raffi Melkonian*
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Federal ID No. 21321
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION 4:12-CV-131

JURY TRIAL DEMANDED

LOIS M. DAVIS,

Plaintiff,

v.

FORT BEND COUNTY, TEXAS

Defendant.

Filed: Oct. 6, 2015

DEFENDANT'S ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now FORT BEND COUNTY, TEXAS (the "County"), Defendant herein, and hereby makes and files its answer, made in response to the allegations set forth in the Plaintiff's First Amended Complaint, as follows:

First Defense

Plaintiff's first amended complaint fails to state a claim upon which relief can be granted.

Second Defense

Defendant denies that all conditions precedent to the Plaintiff's suit have occurred and been performed. Specifically, unlike her *previously dismissed* claims that she had suffered from (1) gender discrimination and (2) retaliation, as to her claim of religious discrimination, Plaintiff Lois Davis neither filed any Charge of Discrimination

with the EEOC, nor did she receive from the EEOC any Dismissal of Charge and Notice of Rights to Sue.

Third Defense

Plaintiff's First Amended Complaint alleges (at Paragraph 5) that:

> All conditions precedent to jurisdiction have occurred or have been complied with in the Equal Employment Opportunity Commission (EEOC). A charge of discrimination was filed with the EEOC within three hundred days of the acts complained of herein and Plaintiff's Original Complaint was filed within ninety days of Plaintiff's receipt of the EEOC' s issuance of a right to sue letter.

While this recital on jurisdiction is accurate as to Plaintiff's claims of (1) gender discrimination and (2) retaliation, it is not true as to Plaintiff's claim of religious discrimination, and thus the Court has no jurisdiction to grant relief on this remaining claim.

Fourth Defense

Plaintiff has failed to exhaust administrative remedies as required prior to the filing of this lawsuit, as to her claim of religious discrimination.

Fifth Defense

Plaintiff's claim of religious discrimination is barred by limitations.

Sixth Defense

As to any claim of religious discrimination, the Plaintiff has been required and/or allowed to amend her pleadings in order to fairly state her claim, if any, for any failure to accommodate her alleged religious belief, practice, or observance (if any) that

allegedly conflicted with her work requirements. Plaintiff has failed to specify any alleged religious belief, practice, or observance that would have conflicted with her work requirements.

Seventh Defense

To any extent that the Plaintiff has alleged any religious belief, practice, or observance that allegedly would have conflicted with her work requirements on July 3, 2011, the Defendant offered to provide a reasonable accommodation to Plaintiff on such occasion, which offer was unreasonably refused by the Plaintiff.

Eighth Defense

To any extent that the Plaintiff has alleged any religious belief, practice, or observance that allegedly would have conflicted with her work requirements on July 3, 2011, and for which the Defendant failed to provide an accommodation requested by the Plaintiff on such occasion, any such requested accommodation was unreasonable.

Ninth Defense

To any extent that the Plaintiff has alleged any religious belief, practice, or observance that allegedly would have conflicted with her work requirements on July 3, 2011, and for which the Defendant failed to provide an accommodation requested by the Plaintiff on such occasion, any such requested accommodation could not have been provided to Plaintiff on such occasion without causing an undue hardship to the County (Defendant).

Tenth Defense

Defendant, Fort Bend County, Texas, as a political subdivision of the State of Texas, is entitled to and does hereby invoke sovereign governmental immunity and/or statutory exemptions, exclusions, and exceptions from liability, and limitations on liability.

Eleventh Defense

Plaintiff was discharged from her employment for legitimate and non-discriminatory departmental business reasons which were not related in any way to any religious discrimination.

Plaintiff's discharge from her employment was not the result of any discriminatory intent, nor was it the result of any discriminatory effect, but rather was due to the legitimate interests of Fort Bend County.

Twelfth Defense

In regard to any punitive or exemplary damages sought by Plaintiff, the Defendant County may not be held liable for punitive or exemplary damages.

Thirteenth Defense

Defendant has not committed any willful violation of law.

Fourteenth Defense

Plaintiff has failed to mitigate her damages, if any, sustained herein.

Answers to Plaintiff's Allegations

Subject to the above and foregoing Defenses, without waiving same but instead expressly insisting thereon, the Defendant (Fort Bend County) answers the allegations made by the Plaintiff as follows:

1. Defendant admits the allegations contained in Paragraph 1.

2. Defendant admits the allegations contained in Paragraph 2, except that any service on the County's Chief Executive Officer (the County Judge) would be at 401 Jackson Street.

3. Defendant admits that federal question and/or civil rights jurisdiction may be invoked under 42 U.S.C. § 2000e, *et seq.*; however, Defendant contends that Plaintiff can neither plead nor prove any specific facts which would establish any valid federal, constitutional, or civil rights claim for relief against Defendant. Additionally, Defendant denies that the Court has jurisdiction to grant relief on Plaintiff's claim of religious discrimination.

4. Defendant admits that the district court previously granted summary judgment to the County on all of Ms. Davis's claims; that this decision was affirmed in part and reversed in part by the United States Court of Appeals for the Fifth Circuit. Defendant denies that Plaintiff has accurately stated everything that was found by the Fifth Circuit, but admits that the Opinion speaks for itself. See: *Davis v. Fort Bend County*, 765 F.3d 480 (5th Cir. 2014). Defendant denies any remaining factual allegations contained in Paragraph 4.

5. Defendant denies that all conditions precedent to the Plaintiff's suit have occurred and been performed. Specifically, unlike her *previously dismissed* claims that she had suffered from (1) gender discrimination and (2) retaliation, as to her claim of religious discrimination, Plaintiff Lois Davis neither filed any Charge of Discrimination

with the EEOC, nor did she receive from the EEOC any Dismissal of Charge and Notice of Rights to Sue. The second sentence of Paragraph 5 states that:

> A charge of discrimination was filed with the EEOC within three hundred days of the acts complained of herein and Plaintiff's Original Complaint was filed within ninety days of Plaintiff's receipt of the EEOC' s issuance of a right to sue letter.

While this recital on jurisdiction is admitted as to Plaintiff's claims of (1) gender discrimination and (2) retaliation, it is denied as to Plaintiff's claim of religious discrimination, and thus the Court has no jurisdiction to grant relief on this remaining claim.

6. Defendant admits the allegations contained in Paragraph 6, except that Defendant denies that Plaintiff was hired as a "Desktop Support Supervisor" responsible for supervising about fifteen information technology ("IT") technicians in December 2007.

7. Defendant admits that the County hired Kenneth Ford in or about November 2009, and Defendant admits that Kenneth Ford and Charles Cook attended the same church. Defendant denies the remaining allegations contained in Paragraph 7.

8. Defendant is without sufficient knowledge or information, after reasonable inquiry, to admit or deny the allegations contained in Paragraph 8.

9. Defendant is without sufficient knowledge or information, after reasonable inquiry, to admit or deny the allegations contained in Paragraph 9.

10. Defendant admits that Plaintiff filed a complaint with its Human Resources Department against Mr. Cook on or about April 1, 2010. Defendant admits that Plaintiff was placed on paid leave pending an investigation of the allegations against Mr. Cook. Defendant further admits that Mr. Cook resigned from employment with the County on or about April 22, 2010. Defendant is unable to admit or deny the remaining allegations contained in Paragraph 10, for the reasons that the same are expressed in terms that are vague, ambiguous, multifarious, and potentially misleading; alternatively, Defendant is without sufficient knowledge or information, after reasonable inquiry, to admit or deny the remaining allegations contained in Paragraph 10.

11. Defendant admits the allegations contained in Paragraph 11.

12. Defendant admits the allegations contained in the first sentence of Paragraph 12. Defendant denies the remaining allegations contained in Paragraph 12.

13. Defendant is without sufficient knowledge or information, after reasonable inquiry, to admit or deny the allegations contained in Paragraph 13.

14. Defendant is unable to admit or deny the allegations contained in the first, second, and third sentences of Paragraph 14, for the reasons that the same are expressed in terms that are vague, ambiguous, multifarious, and potentially misleading. Defendant denies the allegations contained in the fourth (last) sentence of Paragraph 14.

15. Defendant admits the allegations contained in the first sentence of Paragraph 15. Defendant denies the allegations contained in the second and third sentences of Paragraph 15. Defendant admits the allegations contained in the fourth sentence of Paragraph 15. Defendant denies the allegations contained in the fifth (last) sentence of Paragraph 15.

16. Defendant denies the allegations made in the first and second sentences of Paragraph 16. The Defendant is unable to admit or deny the allegations contained in the third sentence of Paragraph 16, for the reasons that the same are expressed in terms that are vague, ambiguous, multifarious, and potentially misleading.

17. Defendant is without sufficient knowledge or information, after reasonable inquiry, to admit or deny the allegations contained in Paragraph 17, except Defendant denies the allegations contained in the last sentence of Paragraph 17.

18. Defendant admits the allegations contained in the first sentence of Paragraph 18. Defendant admits that the Justice Center was ultimately scheduled to open on July 5, 2011 (Monday, July 4, 2011, was a holiday).

19. Defendant is without sufficient knowledge or information, after reasonable inquiry, to admit or deny the allegations made in Paragraph 19.

20. Defendant admits that in June 2011, Mr. Ford informed and/or had informed his staff that they would be required to be available to work during the holiday weekend of July 2-4, 2011 (Monday, July 4, 2011,was a holiday); however, Defendant denies that June 2011 was the first time when Mr. Ford's staff

(including Plaintiff) were informed that they would be required to be available to work during the holiday weekend of July 2-4, 2011; more specifically, in or before early April 2011, all of Mr. Ford's staff (including Plaintiff) were made aware that the holiday weekend of July 4, 2011, would be a mandatory period for all employees to be present. Defendant admits that on or after June 28, 2011, Davis informed Ford (for the first time) that she would not be available to work (1) during the morning of Sunday, July 3, 2011 and (2) thereafter until after the conclusion of her community service event (meal service for the groundbreaking) at her church; however, Defendant denies any remaining allegations contained in the second and third sentences of Paragraph 20. Defendant is without sufficient knowledge or information, after reasonable inquiry, to admit or deny the allegations made in the fourth sentence of Paragraph 20. Defendant denies that Ms. Davis could have "made clear to Fort Bend County" that she would arrange for a substitute to take on her job responsibilities during her absence on July 3, 2011, for the reasons that (1) her absence on July 3, 2011 had not been authorized, (2) even in her absence the Plaintiff was neither authorized to arrange for, nor responsible for arranging, a substitute to take on her job responsibilities on July 3, 2011, (3) the Plaintiff's proposed "substitute" was a non-supervisor and a subordinate who was not sufficiently qualified to take on the supervisory job responsibilities of Ms. Davis on July 3, 2011, (4) the extraordinary events of July 3, 2011 — as included within Fort Bend County's move to its new Justice Center — were not something that the County

"normally did," and thus (5) any prior substitutes authorized to be used for handling Ms. Davis's routine job responsibilities were not done "in similar circumstances."

21. Defendant admits that Mr. Ford told Ms. Davis that her offers to find her own substitute and to return to work only after all activities at her church had been completed were inadequate; that Mr. Ford informed Ms. Davis that, if she were absent that day (July 3, 2011), it would be grounds for a write-up and discipline, including possible termination; and that Ms. Davis completely chose to attend fully all of the activities at her church, and not to attend any of her employment duties at those times on that day (July 3, 2011). Defendant denies any remaining allegations contained in Paragraph 21.

22. Defendant admits the allegations contained in Paragraph 22, except wherein Mr. Ford's until fair warnings are mis-characterized as "Ford's threats."

23. Defendant admits that the Fort Bend County Justice Center opened on time on Tuesday, July 5, 2011. Defendant admits that many of Fort Bend County's employees were dismissed early on Sunday, July 3, 2011, because all those workers who were needed to work that Sunday attended (despite the holiday weekend), they successfully completed their work in a timely and efficient manner, and they did not encounter major and unexpected problems or difficulties. Defendant denies any remaining allegations contained in Paragraph 23. More specifically, the Defendant denies that all Fort Bend County employees were dismissed early on Sunday,

July 3, and Defendant denies that no Fort Bend County employees were needed to complete any remaining work. Defendant further denies that the Fort Bend County Justice Center opened without incident on Monday, July 4, 2011. Finally, the Defendant denies any suggestion or implication that the absence of Ms. Davis, as certain Fort Bend County employees' supervisor, (on Sunday, July 3, 2011) did not impose undue hardships on the County; to the contrary, these undue hardships on the County included (but were not limited to): requiring other employees to assume a disproportionate workload, appearing to allow unequal treatment among employees, creating morale problems, impairing project coordination, decreasing efficiency, and increasing the risk of failure or delays in project completion.

24. No responsive pleading is required as to any allegations contained in Paragraph 24. Alternatively, the Defendant is unable to admit or deny the allegations contained in Paragraph 24, for the reasons that the same call for legal conclusions, and are expressed in terms that are vague, ambiguous, multifarious, and potentially misleading. In the further alternative, the Defendant incorporates by reference herein its responses made to each of Paragraphs 1-44, respectively, of Plaintiff's First Amended Complaint.

25. No responsive pleading is required as to any allegations contained in Paragraph 25. Alternatively, the Defendant incorporates by reference herein its responses made to each of Paragraphs 1-24, respectively, of Plaintiff's First Amended Complaint.

26. Defendant denies the allegations contained in Paragraph 26.

27. Defendant admits that on or after June 28, 2011, Davis informed Ford (for the first time) that she would not be available to work on Sunday, July 3, 2011 due to a personal commitment she had made to attend a community service event at her church, at which she would be needed to help in serving food to the congregation during a groundbreaking event; however, the Defendant denies any remaining allegations contained in the first and second sentences of Paragraph 27. Defendant is unable to admit or deny the allegations contained in the third sentence of Paragraph 27, for the reasons that the same assume disputed facts, and are expressed in terms that are vague, ambiguous, multifarious, and potentially misleading. More specifically, Defendant denies that Ms. Davis informed Mr. Ford or the County of any specific religious belief, practice or observance she held that conflicted with her special requirement to work on Sunday, July 3, 2011; thus, Defendant denies that there was ever any need or occasion for either Mr. Ford or the County to dispute the sincerity of Ms. Davis's religious beliefs in general, or to specifically dispute that her church activities were generally motivated by religion, regardless of whether any specific religious belief, practice or observance she held actually conflicted with her special requirement to work on Sunday, July 3, 2011.

28. Defendant denies that what Ms. Davis told Mr. Ford about her activities at her church would have reasonably indicated to him that her planned absence would have been likely to last only for a few

hours, or that any willingness by her to return to work thereafter would have been adequate to allow her to meaningfully supervise the full day's work to be performed by her subordinates. Defendant denies that Ms. Davis's arrangement for Ms. JoAnn Cosbey to act as her replacement during her absence was authorized, reasonable under the circumstances, or satisfactory for the County's needs.

29. Defendant is unable to admit or deny the allegations contained in the first sentence of Paragraph 29, for the reasons that the same assume disputed facts, and are expressed in terms that are vague, ambiguous, multifarious, and potentially misleading. More specifically, Defendant denies that Ms. Davis's request was only for a few hours off or only to attend the church service. Defendant denies the allegations contained in the second sentence of Paragraph 29.

30. Defendant denies the allegations contained in Paragraph 30.

31. Defendant denies the allegations contained in Paragraph 31.

32. Defendant is unable to admit or deny the allegations contained in the first sentence of Paragraph 32, for the reasons that the same assume disputed facts, and are expressed in terms that are vague, ambiguous, multifarious, and potentially misleading. Defendant admits the allegations contained in the second sentence of Paragraph 32.

33. Defendant denies the allegations contained in Paragraph 33.

34. Defendant denies the allegations contained in Paragraph 34.

35. Defendant denies the allegations contained in Paragraph 35.

36. Defendant denies the allegations contained in Paragraph 36.

37. Defendant denies the allegations contained in Paragraph 37.

38. Defendant denies the allegations contained in Paragraph 38.

39. No responsive pleading is required as to any allegations contained in Paragraph 39.

40. Defendant denies the allegations contained in Paragraph 40.

41. No responsive pleading is required as to any allegations contained in Paragraph 41.

42. Defendant denies the allegations contained in Paragraph 42.

43. No responsive pleading is required as to any allegations contained in the Jury Demand Paragraph.

44. Defendant denies that Plaintiff is entitled to any of the relief requested in her Prayer Paragraph, and the Defendant denies that Plaintiff is entitled to any relief.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that any and all relief sought in the Plaintiff's First Amended Complaint will be in all respects denied, with all costs assessed against Plaintiff, and for all other relief to which Defendant is entitled.

Respectfully submitted,

s/Randall W. Morse/
RANDALL W. MORSE
Assistant County Attorney
SBN: 14549700
301 Jackson Street (Mail)
401 Jackson Street (Office)
Richmond, Texas 77469
Telephone: (281) 341-4555
Facsimile: (281) 341-4557
ATTORNEY FOR DEFENDANT

JURY DEMAND

Comes now the Defendant appearing above, by and through its undersigned counsel, and hereby demands a trial by jury on all issues so triable.

s/Randall W. Morse/
RANDALL W. MORSE

CERTIFICATE OF SERVICE

I hereby certify (1) that the above instrument is being filed electronically, with confirmation to be received that the Electronic Court Filing ("ECF") system has registered such transaction, and with a listing of all attorneys who have received notice of electronic filing of the above instrument, and (2) that the above instrument is being sent by certified mail, return receipt requested, to all known counsel of record, or parties appearing *pro se*, who are not listed as having received such notice of electronic filing of the above instrument; and that both such actions are being done on this, the 6th day of October, 2015.

s/Randall W. Morse/
RANDALL W. MORSE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION 4:12-CV-131

LOIS M DAVIS,

vs.

FORT BEND COUNTY

Filed Apr. 1, 2016

DECLARATION OF LOIS M. DAVIS

Pursuant to 28 U.S.C. §1746, Lois M. Davis declares as follows:

1. I am plaintiff in the above-captioned action.

2. This Declaration and supporting exhibits are submitted in opposition to Fort Bend County's motion to dismiss.

3. The statements contained in this Declaration are based on first-hand knowledge, information contained in documents to which reference is made, and information that has been provided to me by third-parties with first-hand knowledge.

4. I prepared an intake questionnaire for a charge with the Texas Workforce Commission on February 15, 2011. A true and correct copy of this questionnaire is attached hereto as Exhibit A.

5. I filed a formal charge with the Texas Workforce Commission ("TWC") on March 9, 2011.

That initial charge was based on the harassment and discrimination I experienced upon returning from FMLA leave after I was sexually assaulted by the Director of IT at Fort Bend County. Attached as Exhibit B is a true and correct copy of my original complaint with the TWC. The TWC charge was also formally presented to the EEOC.

6. I was terminated from employment at Fort Bend County on or about July 5, 2011, during the pendency of my EEOC and TWC investigations. I filed for unemployment benefits with the TWC on or about July 17, 2011. Attached as Exhibit C is a true and correct copy of my original request for unemployment. The investigations into my original complaint and request for unemployment appeared to have been merged by the TWC.

7. Isabel Robert, Fort Bend County Human Resources Administrative Coordinator responded to a Request for Separation Information from the TWC. The Fort Bend County response details the religious considerations and discriminating conduct of Supervisor, Kenneth Ford and others in the IT Department. Attached as Exhibit D is a true and correct copy of Fort Bend County's Response to TWC's Request for Separation Information dated August 1, 2011.

8. Various rulings were made by the TWC over the course of the next five months. I filed several appeals to the TWC rulings. In an attempt to clarify ongoing and evolving discrimination which took place during my employment and ultimate termination at Fort Bend County, I amended my TWC intake form to include religious discrimination.

9. I amended my TWC intake form to include the word "Religion" as well as marking the Employment Harms or Actions of Discharge and Reasonable Accommodation. These modifications were made to inform the TWC of the religious discrimination which occurred upon my termination. Attached as Exhibit E is a true and correct copy of the amended intake form. I presented the amended form to the TWC and the EEOC during late summer or fall of 2011, prior to November 2011.

10. The Texas Workforce Commission issued a pre-determination letter on November 11, 2011. A true and correct copy of this letter is attached hereto as Exhibit F.

The Texas Workforce Commission issued a dismissal and notice of right to file a civil action on November 17, 2011. A true and correct copy of my TWC right to file a civil action letter is attached hereto as Exhibit G.

11. The EEOC issued a right to sue letter on December 11, 2011. A true and correct copy of my EEOC right to file a civil action letter is attached hereto as Exhibit H.

EXECUTED this 1st day of April, 2016.

Lois M. Davis
LOIS M. DAVIS

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION 4:12-CV-131

JURY TRIAL DEMANDED

LOIS M. DAVIS,

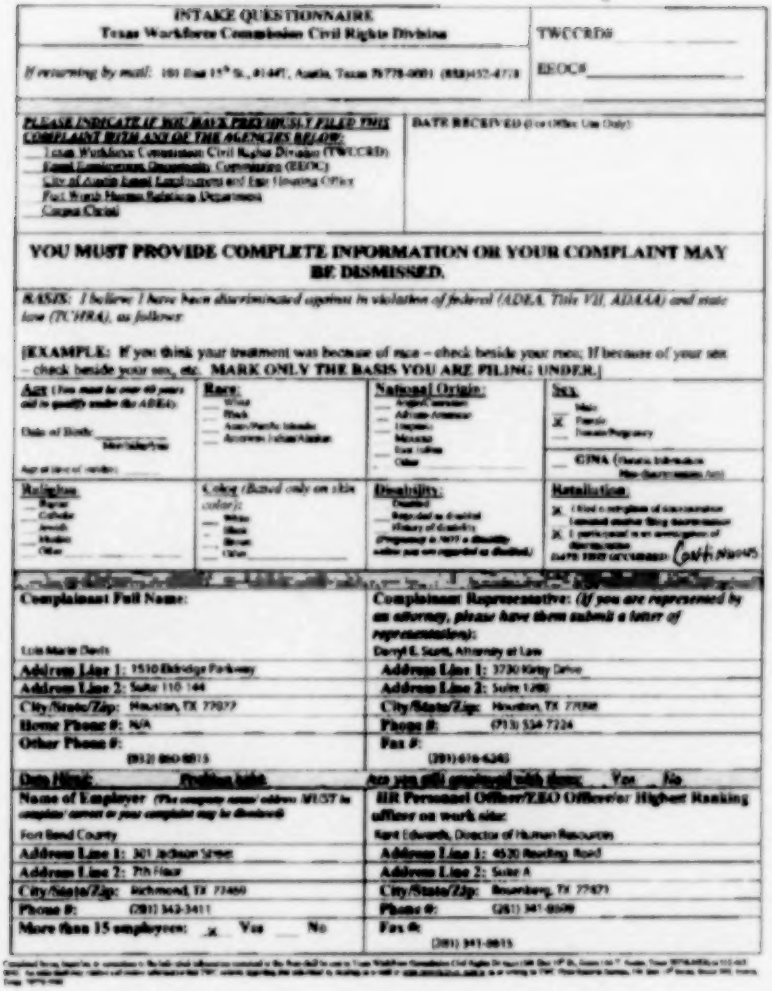
v.

FORT BEND COUNTY

EXHIBIT A

TO

DECLARATION OF LOIS M. DAVIS



INTAKE QUESTIONNAIRE
Texas Workforce Commission Civil Rights Division

TWCCRD#

If returning by mail: 101 East 15th St., #144T, Austin, Texas 78778-0001 (512)452-4778

EEOC#

PLEASE INDICATE IF YOU HAVE PREVIOUSLY FILED THIS COMPLAINT WITH ANY OF THE AGENCIES BELOW:
___ Texas Workforce Commission Civil Rights Division (TWCCRD)
___ Equal Employment Opportunity Commission (EEOC)
___ City of Austin Equal Employment and Fair Housing Office
___ Fort Worth Human Relations Department
___ Corpus Christi

DATE RECEIVED (For TWCCRD Use Only):

YOU MUST PROVIDE COMPLETE INFORMATION OR YOUR COMPLAINT MAY BE DISMISSED.

BASIS: I believe I have been discriminated against in violation of federal (ADEA, Title VII, ADAAA) and state law (TCHRA), as follows:

[**EXAMPLE:** If you think your treatment was because of race – check beside your race; If because of your sex – check beside your sex, etc. **MARK ONLY THE BASIS YOU ARE FILING UNDER.**]

Age (You must be over 40 years old to qualify under the ADEA):
Date of Birth: _____
Age at time of incident: _____

Race:
___ White
___ Black
___ Asian/Pacific Islander
___ American Indian/Alaskan

National Origin:
___ Hispanic
___ African-American
___ Caucasian
___ Mexican
___ East Indian
___ Other _____

Sex:
___ Male
X Female
___ Female/Pregnancy

___ **GINA** (Genetic Information Non-Discrimination Act)

Religion:
___ Baptist
___ Catholic
___ Jewish
___ Muslim
___ Other _____

Color (Based only on skin color):
___ White
___ Black
___ Brown
___ Other _____

Disability:
___ Disabled
___ Regarded as Disabled
___ History of Disability
(Pregnancy is NOT a disability unless you are regarded as disabled.)

Retaliation:
X I filed a complaint of discrimination
___ I assisted another filing discrimination
X I participated in an investigation of discrimination
DATE THEY occurred: Continuous

Complainant Full Name:	**Complainant Representative:** *(If you are represented by an attorney, please have them submit a letter of representation):*
Luis Mario Davis	Darryl E. Scott, Attorney at Law
Address Line 1: 1510 Eldridge Parkway	**Address Line 1:** 3730 Kirby Drive
Address Line 2: Suite 110-144	**Address Line 2:** Suite 1490
City/State/Zip: Houston, TX 77077	**City/State/Zip:** Houston, TX 77098
Home Phone #: N/A	**Phone #:** (713) 524-7224
Other Phone #: (832) 880-8815	**Fax #:** (281) 676-6345
Date Hired: Position title:	**Are you still employed with them:** ___ Yes ___ No
Name of Employer *(The company name/address MUST be complete/ correct or your complaint may be dismissed)*	**HR Personnel Officer/EEO Officer/or Highest Ranking officer on work site:**
Fort Bend County	Kent Edwards, Director of Human Resources
Address Line 1: 301 Jackson Street	**Address Line 1:** 4520 Reading Road
Address Line 2: 7th Floor	**Address Line 2:** Suite A
City/State/Zip: Richmond, TX 77469	**City/State/Zip:** Rosenberg, TX 77471
Phone #: (281) 343-3411	**Phone #:** (281) 341-8609
More than 15 employees: X Yes ___ No	**Fax #:** (281) 341-8615

Completed Intake Questionnaire is the date when information contained in the Intake shall be used to initiate Texas Workforce Commission Civil Rights Division (CRD) charge. Under Title VII, Section 706 of the Civil Rights Act of 1964, as amended, and the Americans with Disabilities Act, as amended, a charge must be filed with the EEOC within 180 days of the date of the alleged unlawful employment practice. Under the Texas Commission on Human Rights Act, a charge must be filed with the CRD within 180 days of the date of the alleged unlawful employment practice. Therefore, to protect your rights, it is important that you contact the CRD or EEOC promptly after the alleged unlawful employment practice occurs.

Employment Harms or Actions (*Mark all that apply*)

___ Severance Pay (B5)	___ Hiring (H2)	___ Suspension (S5)
___ Demotion (D1)	___ Layoff (L1)	___ Terms & Conditions (T2)
___ Discharge (D2)	___ Promotion (P1)	___ Training (T4)
X Discipline (D3)	___ Reasonable Accommodation (R6)	X Wages (W1)
X Harassment (H1)	X Sexual Harassment (S4)	X Other: Hostile Environ

The following questions are optional. The answers will [illegible] your claim.

DATE OF FIRST HARM: 09-21-2010

Explain what happened *(Provide full names and position titles of all involved in this action)*:

Kenneth Ford, Technical Services Mgr, for Fort Bend County IT Department, issued a written warning to me for failure to complete assigned duties. No prior verbal warning was received, which is the department's policy. This warning had no merit.

Reason Employer gave you for their actions:

Not following an assigned task that was supposed to be carried out the prior week

Provide the full names of other employees treated *MORE FAIRLY* than you. *(If you filed under race give their race, if under sex, give their sex, etc.)*:

The task was assigned to BB Rayner, Network Engineer, who was never reprimanded, disciplined or given warning.

DATE OF SECOND HARM: 12-07-2010

Explain what happened *(Provide full names and position titles of all involved in this action)*:

Verbal warnings about my lunch break

Reason Employer gave you for their actions:

Warning to me about taking extended lunch breaks

Provide the full names of other employees treated *MORE FAIRLY* than you. *(If you filed under race give their race, if under sex, give their sex, etc.)*:

Fort Bend County Managers and Supervisors

DATE OF THIRD HARM: 12-10-2010

Explain what happened *(Provide full names and position titles of all involved in this action)*:

My time card submitted to Payroll by my manager coded with Leave Non FMLA - No Pay

Reason Employer gave you for their actions:

None given

Provide the full names of other employees treated *MORE FAIRLY* than you. *(If you filed under race give their race, if under sex, give their sex, etc.)*:

Fort Bend County Managers and Supervisors

[redacted]

I am aware that this charge will also be filed with both the EEOC and State or Local Agency. I will accept my responsibility to advise the agency if I change my address, phone number, or employment status, and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

Signature of Complainant: Kristi M Ward **Date:** 02-15-11 (Month, Day, Year)

TO: **Ms. Bettye Taylor**
bettye.taylor@twc.state.tx.us

FROM: **Lois Marie Davis**
lois.davis@sbcglobal.net

DATE: **February 15, 2011**

RE: **INTAKE QUESTIONNAIRE & SUMMARY**

Thank you so very much for returning my call. May I preface this by noting that I am a single mother who raised her son since he was age 4. As the sole provider for my son, I was determined to put every effort I had in doing the best job possible, to get my son graduated from high school, and off to college. I had been unemployed for 6 months prior to getting this job.

I must speak up now, because:

- I am highly stressed and frustrated
- I have no support from my IT Director, IT Leadership, nor Human Resources
- No other Supervisor at Fort Bend County IT Department is being treated as I
- There is constant action that undermine my ability to succeed at work
- I was told by IT Director if I was unhappy, had I thought about looking for another job - 09/21/10 or 09/22/10
- I was told by IT Director that I needed to communicate with my manager more; asked to spend 30-minutes per day with my manager to

discuss what my team was working on – only because he was informed by my boss that I do not communicate; no other Supervisor is required to do this

- I have received a written warning from my manager for not completing a single task (that was assigned to one of my Network technicians) – 09/21/2010
- I was advised of changes in my job responsibilities by my manager; I am totally left out of interviews of possible candidates to take over the responsibilities I am currently doing – 11/10/2010
- I was advised by my manager and H.R. that if I do not have any accrued time available, regardless of how many hours a week worked, my pay would be docked for a full 8-hour day for the total number of days I am off – 02/04/2011
- My time cards submitted by my manager with Non-FMLA No Pay – 12/09/2010
- I was asked to participate in a meeting (my manager had scheduled) totally unprepared for at the last minute
- I have received verbal warnings three times about taking an extended lunch breaks (I am an exempt employee)
- I am not invited to meetings which directly affect my staff; constantly left out of meetings regarding work discussion or planning that gravely effect team; periodically invited

- There have been interviews with candidates for positions that directly report to me, set up and scheduled by my boss without discussing with me and without checking my schedule; job offers made to candidates without my input, regardless of applicant evaluations submitted by me
- I was removed from a Help Desk project in which I was the Project Lead
- Called into manager's office to discuss 2 or 3 items that may have not been completed by technician in a timely manner (average of 100+ calls per week); no positive feedback from manager at all

I filed a Sexual Harassment Claim against previous FBC IT Director. I was harassed for a two year period (between 12/17/2007 and 04/01/2010. The IT Director left the County on 04/22/10; his official resignation date – 05/31/2010

NOTE: Previous IT Director's friend/church member was hired as my manager prior to Sexual Harassment claim

I returned from 6-week FMLA (due to extreme stress and investigation of claim)

- May 12, 2010 — I returned to work
- May 21, 2010 — I was called into my manager's office to discuss my lunch break (this had never happened in the past)

I am dealing with ongoing actions toward me, which include harassment, discipline, and being subjected to an extremely hostile work environment.

Please let me know of any additional information you need.

I thank you so very much.

IT Leadership Team
Ray Webb, Current IT Director
Connie Heinecke, IT Projects Manager
Carol Holub, Application & System Programming Manager
Kenneth Ford, Technical Services Manager

Reports to Kenneth Ford, Technical Services Manager
Lois Davis, Desktop Support Supervisor
Bill Rimmer, Network Engineer (reports to me)
Margaret Materre, Help Desk Supervisor
David King, Infrastructure Analyst

Kent Edwards, Human Resources Director
Kathy Novasad, H.R. Generalist/Employee Relations

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION 4:12-CV-131

JURY TRIAL DEMANDED

LOIS M. DAVIS,

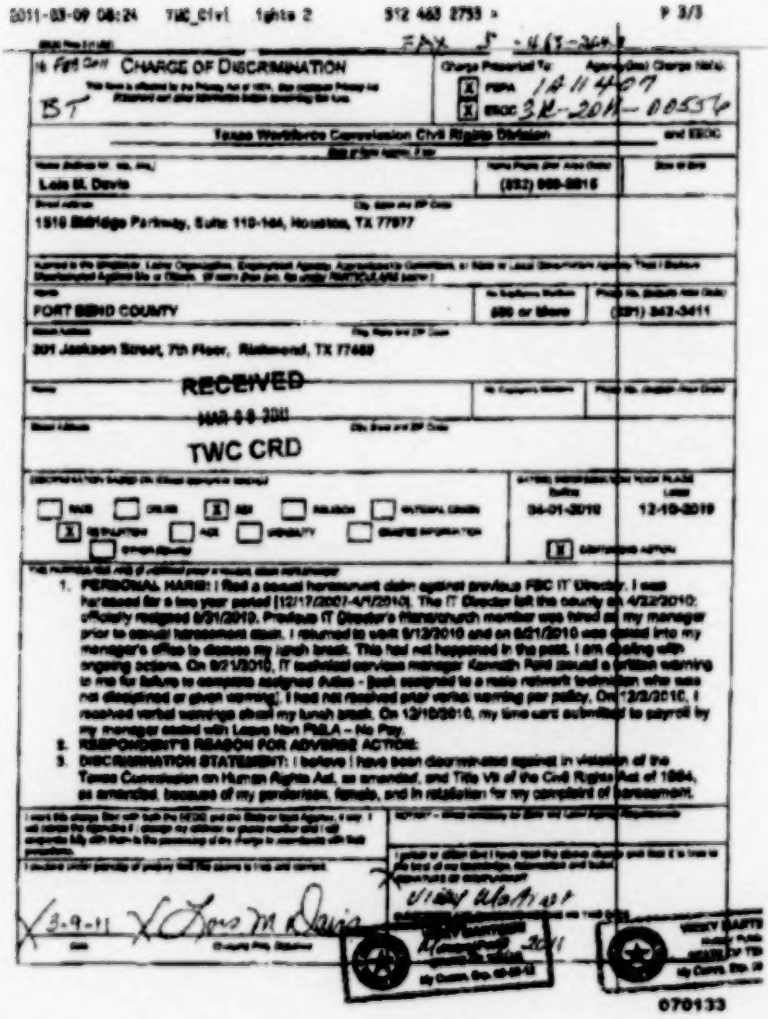
v.

FORT BEND COUNTY

EXHIBIT B

TO

DECLARATION OF LOIS M. DAVIS



2011-03-09 08:24 TWC_Civil Rights 2 512 463 2755 » P 3/3

FAX 5-463-2755

CHARGE OF DISCRIMINATION

Charge Presented To: [X] FEPA 1411407 [X] EEOC 31-2011-00554

Texas Workforce Commission Civil Rights Division and EEOC

Lois M. Davis | (832) 969-8816

1519 Eldridge Parkway, Suite 110-164, Houston, TX 77077

FORT BEND COUNTY | 500 or More | (281) 342-3411

301 Jackson Street, 7th Floor, Richmond, TX 77469

RECEIVED
MAR 09 2011
TWC CRD

RACE [ ] COLOR [X] SEX [ ] RELIGION [ ] NATIONAL ORIGIN
[X] RETALIATION [ ] AGE [ ] DISABILITY [ ] GENETIC INFORMATION
[ ] Other Basis(es)

Earliest: 04-01-2010 | Latest: 12-10-2010 | [X] Continuing Action

1. PERSONAL HARM: I filed a sexual harassment claim against previous FBC IT Director. I was harassed for a two year period [12/17/2007-4/1/2010]. The IT Director left the county on 4/22/2010; officially resigned 6/31/2010. Previous IT Director's friend/church member was hired as my manager prior to sexual harassment claim. I returned to work 8/12/2010 and on 8/21/2010 was called into my manager's office to discuss my lunch break. This had not happened in the past. I am dealing with ongoing actions. On 9/21/2010, IT technical services manager, Kenneth Ford issued a written warning to me for failure to complete assigned duties - task assigned to a radio network technician who was not disciplined or given warning. I had not received prior verbal warning per policy. On 12/3/2010, I received verbal warnings about my lunch break. On 12/10/2010, my time card submitted to payroll by my manager dealing with Leave Non FMLA – No Pay.
2. RESPONDENT'S REASON FOR ADVERSE ACTION:
3. DISCRIMINATION STATEMENT: I believe I have been discriminated against in violation of the Texas Commission on Human Rights Act, as amended, and Title VII of the Civil Rights Act of 1964, as amended, because of my gender/sex, female, and in retaliation for my complaint of harassment.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

3-9-11 X Lois M Davis

I prefer to affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE

Vicky Bartis
Notary Public, State of Texas
My Comm. Exp. 10-09-13

VICKY BARTIS
Notary Public, State of Texas
My Comm. Exp. 10-09-13

070133

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION 4:12-CV-131

JURY TRIAL DEMANDED

LOIS M. DAVIS,

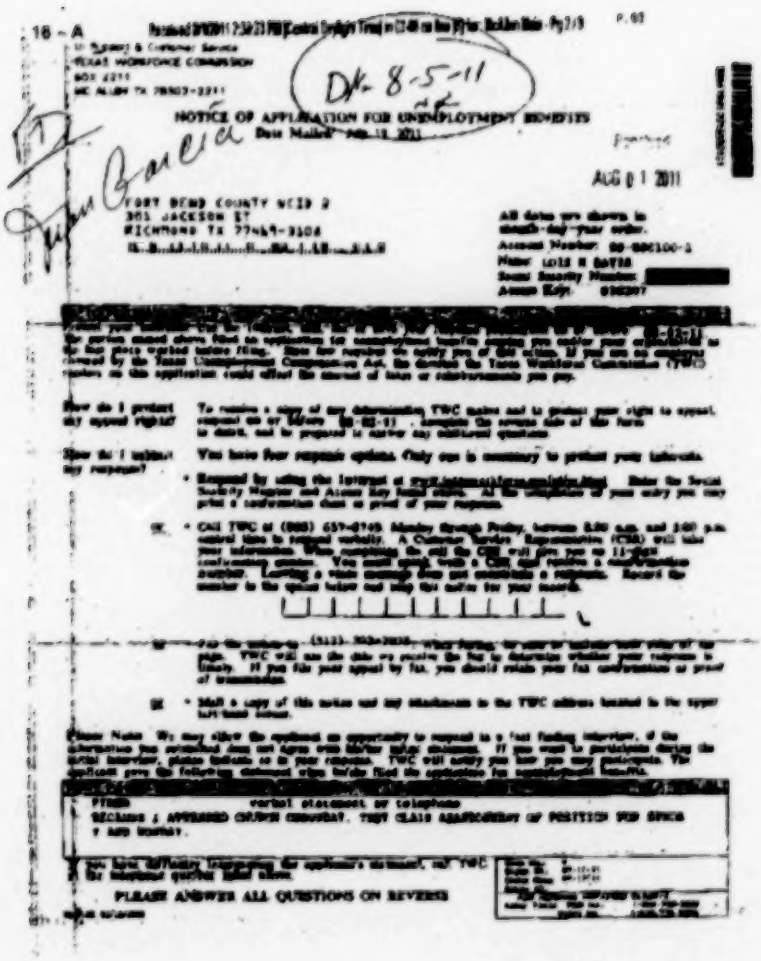
v.

FORT BEND COUNTY

EXHIBIT C

TO

DECLARATION OF LOIS M. DAVIS



18 - A

TEXAS WORKFORCE COMMISSION

NOTICE OF APPLICATION FOR UNEMPLOYMENT BENEFITS

Date Mailed: AUG 01 2011

FORT BEND COUNTY WCID 2
301 JACKSON ST
RICHMOND TX 77469-3108

All dates are shown in month-day-year order.
Account Number: 09-606100-1
Name: LOIS H SMITH
Social Security Number: [redacted]
Annual Rate: $36207

How do I protest my appeal rights?

How do I submit my response?

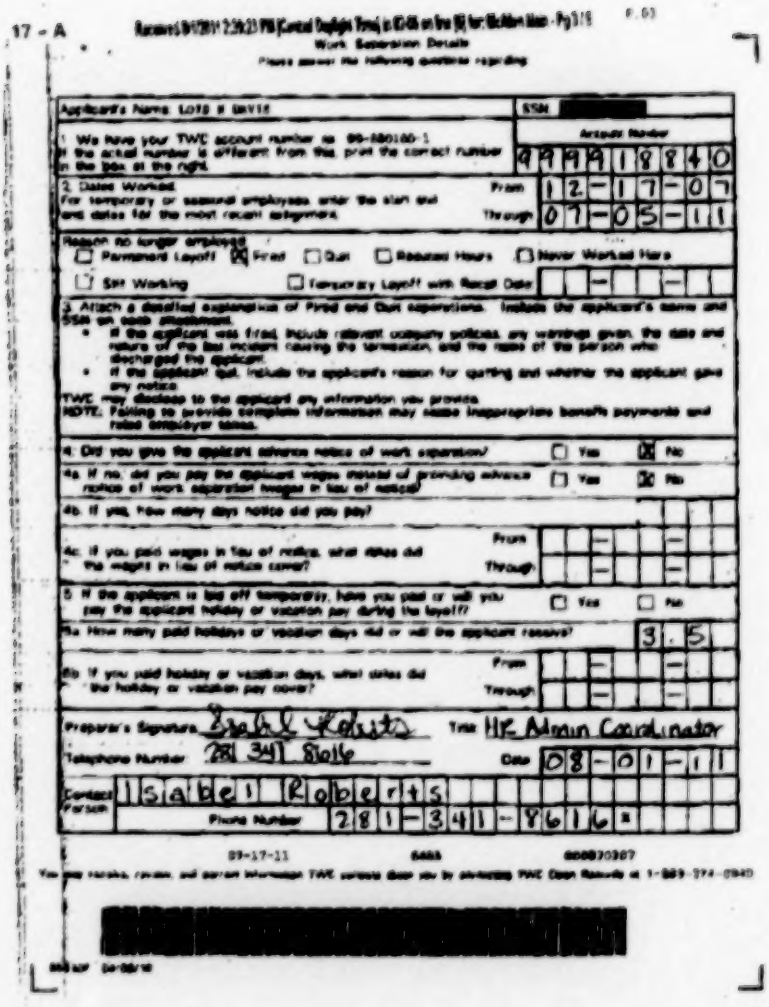
Call TWC at (888) 657-8745 Monday through Friday, between 8:30 a.m. and 3:00 p.m. central time to respond verbally. A Customer Service Representative (CSR) will take your information. When completing the call the CSR will give you an 11-digit confirmation number. You could speak with a CSR and receive a confirmation number, leaving a voice message that you attempted to respond. Record the number in the space below and keep this notice for your records.

Mail a copy of this notice and any attachments to the TWC address located in the upper left-hand corner.

Please Note: We may offer the applicant an opportunity to respond in a fact finding interview. If the information you furnished does not agree with his/her initial statement, it may be used to determine during the initial interview, please indicate so in your response. TWC will notify you how you may participate. The applicant gave the following statement when he/she filed the application for unemployment benefits.

PTSER verbal statement, by telephone
BECAUSE I APPEARED CHURCH CHOIRSAT. THEY CLAIM ABANDONMENT OF POSITION FOR EMCH
Y AND MONTHS.

PLEASE ANSWER ALL QUESTIONS ON REVERSE



17 - A

Work Separation Details

Please answer the following questions regarding

Applicant's Name: LOTO II DAVIS | SSN: [redacted]

1. We have your TWC account number as 99-880180-1. If the actual number is different from this, print the correct number in the box at the right. | Account Number: 9999184840

2. Dates Worked. For temporary or seasonal employees, enter the start and end dates for the most recent assignment. From: 12-17-07 Through: 07-05-11

Reason no longer employed: ☐ Permanent Layoff ☒ Fired ☐ Quit ☐ Reduced Hours ☐ Never Worked Here ☐ Still Working ☐ Temporary Layoff with Recall Date: ___-___-___

3. Attach a detailed explanation of Fired and Quit separations. Include the applicant's name and SSN on each attachment.
- If the applicant was fired, include relevant company policies, any warnings given, the date and nature of the last incident leading the termination, and the name of the person who discharged the applicant.
- If the applicant quit, include the applicant's reason for quitting and whether the applicant gave any notice.

TWC may disclose to the applicant any information you provide.
NOTE: Failing to provide complete information may cause inappropriate benefit payments and raise employer taxes.

4. Did you give the applicant advance notice of work separation? ☐ Yes ☒ No

4a. If no, did you pay the applicant wages instead of providing advance notice of work separation (wages in lieu of notice)? ☐ Yes ☒ No

4b. If yes, how many days notice did you pay? ___

4c. If you paid wages in lieu of notice, what dates did the wages in lieu of notice cover? From: ___-___-___ Through: ___-___-___

5. If the applicant is laid off temporarily, have you paid or will you pay the applicant holiday or vacation pay during the layoff? ☐ Yes ☐ No

5a. How many paid holidays or vacation days did or will the applicant receive? 3.5

5b. If you paid holiday or vacation days, what dates did the holiday or vacation pay cover? From: ___-___-___ Through: ___-___-___

Preparer's Signature: Isabel Roberts Title: HR Admin Coordinator

Telephone Number: 281 341 8616 Date: 08-01-11

Contact Person: Isabel Roberts Phone Number: 281-341-8616 x

09-17-11 6488 000870307

You may review, revise, and correct information TWC receives about you by accessing TWC Data Review at 1-888-274-3940.

[redacted]

TWC-P-0858-10

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION 4:12-CV-131

JURY TRIAL DEMANDED

LOIS M. DAVIS,

v.

FORT BEND COUNTY

EXHIBIT D

TO

DECLARATION OF LOIS M. DAVIS

HUMAN RESOURCES DEPARTMENT
FORT BEND COUNTY, TEXAS

TO: Texas Workforce Commission

FROM: Isabel Roberts
Human Resources Administrative Coordinator

DATE: August 1, 2011

RE: Request for separation information
Employee: Lois Davis.; SSN xxx-xx-xxxx

Lois Davis was the Desk Top Support Supervisor in the Information Technology Department for Fort Bend County. As such, she was expected to work the weekend of June 30-July 4, 2011, along with the entire Information Technology Department staff. Fort Bend County was moving into the new 265,000 sq. ft. Justice Center. Relocating and installing computers in the new Justice Center for six (6) District Courts, four (4) County Courts, County Clerk, District Clerk, District Attorney, and other offices who support the courts was paramount to the move. Employees of the Information Technology Department, including Ms Davis, were told months in advance that they would have to work the weekend of June 30-July 4, 2011.

On June 28, 2011, two (2) days before the scheduled move, Ms Davis verbally notified her supervisor, Kenneth Ford, that she was not able to work on Sunday, July 3, 2011, because she had an all day church event to attend. Kenneth Ford informed Ms Davis that she was expected to work the entire weekend. Mr. Ford attempted to compromise with

Ms Davis by allowing her the opportunity to go to church on Sunday morning and report to work after services. She rejected this offer. Mr. Ford informed her that if she did not report to work on Sunday, she would be subject to discipline up to and including termination. Ms Davis failed to report to work on Sunday, July 3, 2011. Ms Davis' entire team worked on July 3, 2011. Furthermore, she was scheduled to work on Monday, July 4, 2011, yet she failed to show up to work on that date and did not email or notify her supervisor in any way that she was unable to work on Monday, July 4. Ms Davis' entire team worked on July 4, 2011. Ms Davis' failure to work this weekend that had been scheduled months in advance was unexcused and in complete disregard for her Supervisor and her team, as well as the departments who needed her assistance so that the Courts could be operational at the new facility on Tuesday, July 5, 2011.

Ms Davis reported to work on Tuesday, July 5 but was sent home with pay. That day, the decision was made to terminate Ms Davis for failure to report to work on Sunday and Monday July 3 and 4 as directed. Ray Webb, IT Director, informed her of this decision by phone on Wednesday, July 6.

Date of Hire:	December 17, 2007
Last Date Worked:	July 5, 2011
Title:	Desk Top Support Supervisor
Rate of Pay:	$26.93 per hour
Reason:	Terminated for Violation of Policy

If you should have any questions, please do not hesitate to contact me.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION 4:12-CV-131

JURY TRIAL DEMANDED

LOIS M. DAVIS,

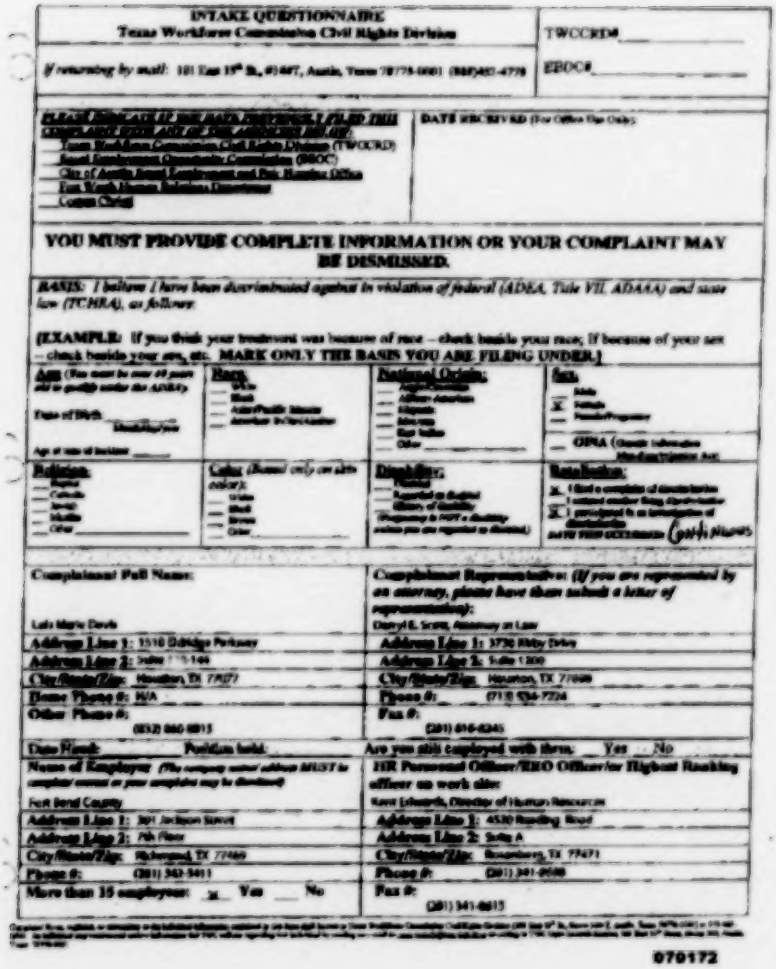
v.

FORT BEND COUNTY

EXHIBIT E

TO

DECLARATION OF LOIS M. DAVIS



INTAKE QUESTIONNAIRE
Texas Workforce Commission Civil Rights Division

TWCCRD#_____

If returning by mail: 101 East 15th St., #144T, Austin, Texas 78778-0001 (512)463-4778

EEOC#_____

PLEASE INDICATE IF THIS MATTER PREVIOUSLY FILED THIS COMPLAINT WITH ANY OF THE AGENCIES BELOW:
__ Texas Workforce Commission Civil Rights Division (TWCCRD)
__ Equal Employment Opportunity Commission (EEOC)
__ City of Austin Equal Employment and Fair Housing Office
__ Fort Worth Human Relations Commission
__ Corpus Christi

DATE RECEIVED (For Office Use Only)

YOU MUST PROVIDE COMPLETE INFORMATION OR YOUR COMPLAINT MAY BE DISMISSED.

BASIS: I believe I have been discriminated against in violation of federal (ADEA, Title VII, ADAAA) and state law (TCHRA), as follows:

(EXAMPLE: If you think your treatment was because of race – check beside your race; if because of your sex – check beside your sex, etc. **MARK ONLY THE BASIS YOU ARE FILING UNDER.)**

Age (You must be over 40 years old to qualify under the ADEA)
Date of Birth _____ (Month/Day/Year)
Age at time of incident _____

Race:
__ White
__ Black
__ Asian/Pacific Islander
__ American Indian/Alaskan

National Origin:
__ Hispanic
__ African American
__ Hispanic
__ Middle East
__ Asian
__ Other _____

Sex:
__ Male
X Female
__ Pregnancy

__ GINA (Genetic Information Nondiscrimination Act)

Religion:
__ Baptist
__ Catholic
__ Jewish
__ Muslim
__ Other _____

Color (Based only on skin color):
__ White
__ Black
__ Brown
__ Other _____

Disability:
__ Physical
__ Reported to Employer
__ Mental
__ Perceived as Disabled by Employer
(Pregnancy is NOT a disability unless you are reported to disabled)

Retaliation:
X I filed a complaint of discrimination
__ I opposed another form of discrimination
X I participated in an investigation of discrimination
DATE THIS occurred: Continuous

Complainant Full Name:	**Complainant Representative:** *(If you are represented by an attorney, please have them submit a letter of representation):*
Lois Marie Davis	Darryl L. Scott, Attorney at Law
Address Line 1: 1510 Eldridge Parkway	**Address Line 1:** 3730 Kirby Drive
Address Line 2: Suite 1100	**Address Line 2:** Suite 1200
City/State/Zip: Houston, TX 77077	**City/State/Zip:** Houston, TX 77098
Home Phone #: N/A	**Phone #:** (713) 524-7724
Other Phone #: (832) 860-8813	**Fax #:** (281) 816-8245
Date Hired: _____ **Position held:** _____	**Are you still employed with them:** __ Yes __ No
Name of Employer *(The company owner whose MUST be named correct or your complaint may be dismissed)* Fort Bend County	**HR Personnel Officer/EEO Officer/or Highest Ranking officer on work site:** Kent Edwards, Director of Human Resources
Address Line 1: 301 Jackson Street	**Address Line 1:** 4520 Reading Road
Address Line 2: 7th Floor	**Address Line 2:** Suite A
City/State/Zip: Richmond, TX 77469	**City/State/Zip:** Rosenberg, TX 77471
Phone #: (281) 342-3411	**Phone #:** (281) 341-8600
More than 15 employees: X Yes __ No	**Fax #:** (281) 341-8615

070172

Employment Harms or Actions (Mark all that apply)

___ Severance Pay (B5)	___ Hiring (H2)	___ Suspension (S5)
___ Demotion (D1)	___ Layoff (L1)	___ Terms & Conditions (T2)
✓ Discharge (D2)	___ Promotion (P2)	___ Training (T4)
X Discipline (D3)	✓ Reasonable Accommodation (R6)	X Wages (W1)
X Harassment (H1)	X Sexual Harassment (S4)	X Other: Hostile Environ; Retaliation

The following questions are regarding the actions of discrimination taken against you *(Each portion must be within 180 days from the date you retained the law you select your complaint in the EEOC/FEPA)*

DATE OF FIRST HARM: 10-21-2010

Explain what happened *(Provide full names and position titles of all involved in this action)*:

Kenneth Ford, Technical Services Mgr, for Fort Bend County ff Department, issued a written warning to me for failure to complete assigned duties. No prior verbal warning was received, which is the department's policy. This warning had no merit.

Reason Employer gave you for their actions:

Not following an assigned task that was supposed to be carried out the prior week

Provide the full names of other employees treated *MORE FAIRLY* than you. *(If you filed under race give their race, if under sex, give their sex, etc.)*:

The task was assigned to Bill Ramirez, Network Engineer, who was never reprimanded, disciplined or given warning.

DATE OF SECOND HARM: 12-02-2010

Explain what happened *(Provide full names and position titles of all involved in this action)*:

Verbal warnings about my lunch break

Reason Employer gave you for their actions:

Warning to me about taking extended lunch breaks

Provide the full names of other employees treated *MORE FAIRLY* than you. *(If you filed under race give their race, if under sex, give their sex, etc.)*:

Fort Bend County Managers and Supervisors

DATE OF THIRD HARM: 12-16-2010

Explain what happened *(Provide full names and position titles of all involved in this action)*:

My time card submitted to Payroll by my manager coded with Leave Non FMLA - No Pay

Reason Employer gave you for their actions:

None given

Provide the full names of other employees treated *MORE FAIRLY* than you. *(If you filed under race give their race, if under sex, give their sex, etc.)*:

Fort Bend County Managers and Supervisors

SIGNATURE

I am aware that this charge will also be filed with both the EEOC and State or local Agency. I will accept any responsibility to advise the agency if I change my address, phone number, or employment status, and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

Signature of Complainant: Kristi M Davis **Date:** 02-15-11 (Month, Day, Year)

070173

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION 4:12-CV-131

JURY TRIAL DEMANDED

LOIS M. DAVIS,

v.

FORT BEND COUNTY

EXHIBIT F

TO

DECLARATION OF LOIS M. DAVIS

TEXAS WORKFORCE COMMISSION
CIVIL RIGHTS DIVISION

November 10, 2011

PRE-DETERMINATION LETTER

Lois Davis
c/o Darryl Scott, Attorney
3730 Kirby Dr., Suite 1200
Houston, TX 77098

RE: Lois Davis v. Fort Bend County
TWCCRD NO. 1A11407
EEOC NO. 31C-2011-00556

Dear Ms. Davis:

We have completed a careful review of the charge of employment discrimination you filed against Westlake Chemical Corp. Our review included an assessment of all the information/documentation submitted by both parties.

As a result of the review, we have made a preliminary decision to dismiss the charge on or about 11/23/11. Based on the available evidence/information, it cannot be established that the employer has discriminated against you based on Sex, Retaliation, or any other reason prohibited by the laws we enforce.

The available information/evidence shows:

Performance Evaluation dated 12/20/10 is rated Overall as "Meets Job Requirements"

Affidavit from the Director of HR affirms on 4/5/10, you delivered a Request for FMLA and a complaint of Sexual Harassment to HR alleging you were subjected to sexual harassment by you Director and needed paid leave, as this had caused you emotional issues and were seeking medical treatment. Respondent further affirms you were granted paid FMLA until your return on May 12, 2010, although you had no accrued leave, along with a copy of the Employee Action Form show "Leave-Paid FMLA". Respondent immediately conducted an internal investigation while you were on leave and affirms several employees corroborated your allegations, although the Director denied all allegations. Respondent also affirms that the Director elected to resign after he was informed that he would be required to go before the Commissioner's Court to discuss the investigation and potential disciplinary action, in accordance with Respondent's policies. A copy of the Agenda for said meeting shows the action on the Items list of the Agenda.

Respondent provided a list of supervisory employees who have been terminated for violation of policies, which shows a total of 13, including yourself, of which 8 were female and 5 were males. Respondent affirms, and your termination document reflects that you were terminated for violation of policies. It is affirmed that you were instructed to assist in the County offices being moved on Sunday 7/3/11 and became insubordinate to managers, stating you had Church commitments, refused to answer several calls, emails, and text messages

when management was trying to locate you on the day before the move, refused to state your location, then did not call or show up on the moving day. A copy of the newspaper article of the move was provided, copies of emails asking that you meet with your supervisor, and all County policies were also provided. Records reflect that you were granted paid FMLA, and an immediate investigation was conducted upon your lodging a complaint, witnesses corroborated your allegations, and the Director elected to resign in lieu of disciplinary action.

Without more specific evidence of discrimination provided by you, the Commission will not take further action on the charge because there is not enough evidence that indicates further investigation will result in establishing a violation.

If you have additional evidence to offer in support of your allegations, you should submit it in writing at the listed address or Fax number 512/463-2643, to ensure our receipt before 11/23/11 (or postmarked with this date.). You may call the Investigator listed below, or Janet Quesnel, Team Manager, at 512/463-4363 or toll free 1/888/452-4778. If your charge is dismissed at that time, the Dismissal Notice explains, that while the Commission is not certifying that the employer is in compliance with the laws we enforce, our investigation has revealed insufficient evidence to warrant further processing of the charge. The Notice will describe your right to pursue the matter by filing a lawsuit in state court within 60 days of your receipt of the notice and your right to contact the EEOC in writing within 15 days of your receipt to request a review of the Division's decision.

Once your case has been closed, you may receive a complete copy of the file by submitting an Open Records request at open.records@twc.state.tx.us or contacting CRD direct.

Sincerely,

Patty Herrera
Civil Rights Investigator

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION 4:12-CV-131

JURY TRIAL DEMANDED

LOIS M. DAVIS,

v.

FORT BEND COUNTY

EXHIBIT G

TO

DECLARATION OF LOIS M. DAVIS

DISMISSAL AND NOTICE OF RIGHT TO FILE A CIVIL ACTION

FROM: Texas Workforce Commission
Civil Rights Division
101 E 15th St # 144-T
Austin, TX 78778-0001

TO: Lois Davis
c/o Darryl Scott, Attorney
3730 Kirby Dr., Suite 1200
Houston, TX 77098

TWCCRD Charge No. **1A11407**

EEOC Charge No. **31C-2011-00556**

TWCCRD Representative: **PAH**

THE TWCCRD IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

[ ] Your allegations did not involve a disability that is covered by the Americans with Disabilities Act or the Texas Commission on Human Rights Act.

[ ] The Respondent employs less than the required number of employees or not otherwise covered by the statutes.

[ ] Having been given 30 days in which to respond, you failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve your charge.

[ ] The TWCCRD issues the following determination: Based upon its investigation, the TWCCRD is unable to conclude that the information obtained establishes any violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

[X] Other: **COMPLAINANT REQUESTED NOTICE OF RIGHT TO FILE CIVIL ACTION**

NOTICE OF RIGHT TO FILE A CIVIL ACTION

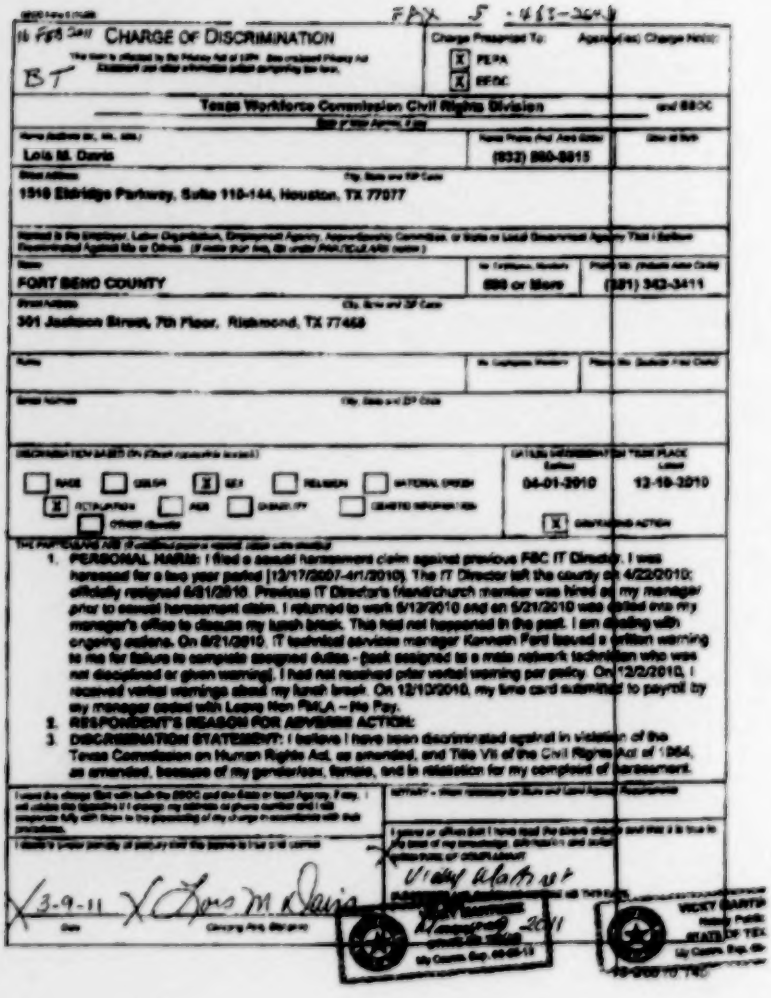
Pursuant to Sections 21.208, 21.252 and 21.254 of the Texas Labor Code, as amended, this notice is to advise you of your right to bring a private civil action in state court in the above referenced case. **PLEASE BE ADVISED THAT YOU HAVE SIXTY (60) DAYS FROM THE DATE OF SIGNATURE TO FILE THIS CIVIL ACTION.** (The time limit for filing suit based on a federal claim may be different.)

On behalf of the Commission

/s/ Janet G. Quesnel
Janet G. Quesnel,
Employment Manager
Texas Workforce Commission

DATE: 11/17/11

cc: Mary Reveles, Assistant County Attorney
Fort Bend County
301 Jackson St., 7th Floor
Richmond, TX 77469



FAX 5-463-3660

16 FEB 2011 CHARGE OF DISCRIMINATION

BT

Charge Presented To: [X] FEPA [X] EEOC

Texas Workforce Commission Civil Rights Division and EEOC

Lois M. Davis — (832) 860-5815

1510 Eldridge Parkway, Suite 110-144, Houston, TX 77077

FORT BEND COUNTY — 500 or More — (281) 342-3411

301 Jackson Street, 7th Floor, Richmond, TX 77469

[X] SEX [X] RETALIATION — Earliest: 04-01-2010 — Latest: 12-10-2010 — [X] CONTINUING ACTION

1. PERSONAL HARM: I filed a sexual harassment claim against previous FBC IT Director. I was harassed for a two year period (12/17/2007-4/1/2010). The IT Director left the county on 4/22/2010; officially resigned 5/31/2010. Previous IT Director's friend/church member was hired as my manager prior to sexual harassment claim. I returned to work 9/13/2010 and on 9/21/2010 was called into my manager's office to discuss my lunch break. This had not happened in the past. I am dealing with ongoing actions. On 9/21/2010, IT technical services manager Kenneth Ford issued a written warning to me for failure to complete assigned duties - task assigned to a male network technician who was not disciplined or given warning). I had not received prior verbal warning per policy. On 12/2/2010, I received verbal warnings about my lunch break. On 12/10/2010, my time card submitted to payroll by my manager coded with Leave Non PMLA – No Pay.
2. RESPONDENT'S REASON FOR ADVERSE ACTION:
3. DISCRIMINATION STATEMENT: I believe I have been discriminated against in violation of the Texas Commission on Human Rights Act, as amended, and Title VII of the Civil Rights Act of 1964, as amended, because of my gender/sex, female, and in retaliation for my complaint of harassment.

3-9-11 X Lois M Davis

Vicky Martinez

VICKY MARTINEZ — Notary Public — STATE OF TEXAS — My Comm. Exp. 09-08-13

INTAKE QUESTIONNAIRE
Texas Workforce Commission Civil Rights Division

TWCCRD#_____

If returning by mail: 101 East 15th St., #144T, Austin, Texas 78778-0001 (888)452-4778

EEOC#_____

PLEASE INDICATE IF YOU HAVE PREVIOUSLY FILED THIS COMPLAINT WITH ANY OF THE AGENCIES BELOW:
__ Texas Workforce Commission Civil Rights Division (TWCCRD)
__ Equal Employment Opportunity Commission (EEOC)
__ City of Austin Equal Employment and Fair Housing Office
__ Fort Worth Human Relations Department
__ Dallas Office

DATE RECEIVED (For Office Use Only):

YOU MUST PROVIDE COMPLETE INFORMATION OR YOUR COMPLAINT MAY BE DISMISSED.

BASIS: *I believe I have been discriminated against in violation of federal (ADEA, Title VII, ADAAA) and state law (TCHRA), as follows:*

[EXAMPLE: If you think your treatment was because of race – check beside your race; If because of your sex – check beside your sex, etc. **MARK ONLY THE BASIS YOU ARE FILING UNDER.]**

Age (You must be over 40 years old to qualify under the ADEA).
Date of Birth: _____ (Month/day/year)
Age at time of incident: _____

Race:
__ White
__ Black
__ Asian/Pacific Islander
__ American Indian/Alaskan

National Origin:
__ Anglo/American
__ African American
__ Hispanic
__ Mexican
__ East Indian
__ Other _____

Sex
__ Male
X Female
__ Female Pregnancy

__ GINA (Genetic information Non-discrimination Act)

Religion:
__ Baptist
__ Catholic
__ Jewish
__ Muslim
__ Other _____

Color (Based only on skin color):
__ White
__ Black
__ Brown
__ Other _____

Disability:
__ Disabled
__ Regarded as Disabled
__ History of Disability
(Pregnancy is NOT a disability unless you are regarded as disabled)

Retaliation:
X I filed a complaint of discrimination / opposed unfair hiring discrimination
X I participated in an investigation of discrimination
DATE THIS occurred: 6/11/2015

Complainant Full Name:	**Complainant Representative:** *(If you are represented by an attorney, please have them submit a letter of representation):*
Luis Mario Davis	Darryl E. Scott, Attorney at Law
Address Line 1: 1510 Eldridge Parkway	**Address Line 1:** 3730 Kirby Drive
Address Line 2: Suite 110-144	**Address Line 2:** Suite 1300
City/State/Zip: Houston TX 77077	**City/State/Zip:** Houston, TX 77098
Home Phone #: N/A	**Phone #:** (713) 554-7224
Other Phone #: (832) 860-8815	**Fax #:** (281) 616-8249
Date Hired:	**Position held:**	Are you still employed with them: __ Yes __ No
Name of Employer *(The company name/ address MUST be complete/ correct or your complaint may be dismissed)* Fort Bend County	**HR Personnel Officer/EEO Officer/or Highest Ranking officer on work site:** Kent Edwards, Director of Human Resources
Address Line 1: 301 Jackson Street	**Address Line 1:** 4520 Reading Road
Address Line 2: 7th Floor	**Address Line 2:** Suite A
City/State/Zip: Richmond, TX 77469	**City/State/Zip:** Rosenberg, TX 77471
Phone #: (281) 342 3411	**Phone #:** (281) 341-8600
More than 15 employees: X Yes __ No	**Fax #:** (281) 341-8615

Completed forms, attachments, or amendments to the intake questionnaire received by the Texas Workforce Commission Civil Rights Division (TWCCRD) will be sent to Texas Workforce Commission Civil Rights Division, P.O. Box 13474, Austin, Texas 78711-3474. The TWCCRD will not accept complaints submitted by e-mail or fax. Complaints may be submitted in person at the TWCCRD's office at 101 East 15th Street, Room 144-T, Austin, Texas 78778-0001.

Employment Harms or Actions (*Mark all that apply.*)

___ Severance Pay (B5)	___ Hiring (H2)	___ Suspension (S5)
___ Demotion (D1)	___ Layoff (L1)	___ Terms & Conditions (T2)
✓ Discharge (D2)	___ Promotion (P3)	___ Training (T4)
X Discipline (D3)	✓ Reasonable Accommodation (R6)	X Wages (W1)
X Harassment (H1)	X Sexual Harassment (S4)	X Other: Hostile Environ., Retaliation

The following questions are regarding the actions of discrimination taken against you *(Each incident must be within 300 days (approximately 6 months) of the time you submit your complaint to the EEOC).*

DATE OF FIRST HARM: 09-21-2010

Explain what happened *(Provide full names and position titles of all involved in this action)*:

Kenneth Ford, Technical Services Mgr, for Fort Bend County IT Department, issued a written warning to me for failure to complete assigned duties. No prior verbal warning was received, which is the department's policy. This warning had no merit.

Reason Employer gave you for their actions:

Not following an assigned task that was supposed to be carried out the prior week

Provide the full names of other employees treated *MORE FAIRLY* than you. *(If you filed under race give their race, if under sex, give their sex, etc.)*:

The task was assigned to Bill Penman, Network Engineer, who was never reprimanded, disciplined or given warning.

DATE OF SECOND HARM: 12-02-2010

Explain what happened *(Provide full names and position titles of all involved in this action)*:

Verbal warnings about my lunch break

Reason Employer gave you for their actions:

Warning to me about taking extended lunch breaks

Provide the full names of other employees treated *MORE FAIRLY* than you. *(If you filed under race give their race, if under sex, give their sex, etc.)*:

Fort Bend County Managers and Supervisors

DATE OF THIRD HARM: 12-10-2010

Explain what happened *(Provide full names and position titles of all involved in this action)*:

My time card submitted to Payroll by my manager coded with Leave Non FMLA - No Pay

Reason Employer gave you for their actions:

None given

Provide the full names of other employees treated *MORE FAIRLY* than you. *(If you filed under race give their race, if under sex, give their sex, etc.)*:

Fort Bend County Managers and Supervisors

SIGNATURE

I am aware that this charge will also be filed with both the EEOC and State or local Agency. I will accept my responsibility to advise the agency if I change my address, phone number, or employment status, and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

Signature of Complainant: Lois M Davis **Date:** 02-15-11 (Month, Day, Year)

TEXAS WORKFORCE COMMISSION
CIVIL RIGHTS DIVISION

FEBRUARY 25, 2011
PERFECTED COMPLAINT LETTER

LOIS DAVIS
C/O DARRYL SCOTT, ATTORNEY
3730 KIRBY DR., SUITE 1200
HOUSTON, TX 77098

Dear MS. DAVIS:

REFERENCE: **LOIS M. DAVIS V. FORT BEND COUNTY**

This is to advise you that your complaint of employment discrimination, dated FEBRUARY 16, 2011, has been accepted for investigation by the Texas Workforce Commission Civil Rights Division (CRD). I have been assigned the responsibility for all matters concerning this complaint. **If you have filed this same charge with the US Equal Employment Opportunity Commission, please contact me immediately**.

Enclosed are two Charge of Discrimination forms. If there are any errors or questions, please contact me before making any mark(s) on the forms. If there are no errors in what is written, take the forms to a notary public, sign and date one form in black ink in the places indicated by an "X". Have the notary public notarize the form and return the notarized form to the CRD by mail or FAX within 10 days of receipt. Please keep the copy for your own

information and record. Failure to **return the signed and notarized charge by MARCH 10, 2011**, will result in dismissal of your complaint.

If your complaint is based on disability, the CRD will need the following: Diagnosis and prognosis of your disability; State the major life activity that is impaired and describe the impairment; State whether the disability predictable or unpredictable; State whether the disability a permanent or temporary condition; State whether you can perform the essential functions of your position with or without a workplace accommodation; If an accommodation is required, state what type of workplace accommodation would be necessary; State whether the disability is controlled by medication; If so, describe the medication and the effects of the medication.

All documentation you receive as part of the CRD's assessment and investigative process related to your complaint should remain confidential and should not be shared with any member of the public with the exception of your attorney or other person you have identified as your authorized representative. Your authorized representative will need to provide the CRD with a statement of representation, including name, address, and telephone number. Upon receipt of a letter of representation, all further communication from the CRD related to the above referenced complaint will be forwarded to your representative.

Please contact me toll free at 1 (888) 452-4778 ext. 34851 or my direct line at (512) 463-4851, if you have

any questions about the Charge of Discrimination forms.

Sincerely,

/s/ Bettye Taylor

Bettye Taylor, Intake Investigator

Attachment: Charge of Discrimination Forms (2)

U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION

NOTICE OF RIGHT TO SUE WITHIN 90 DAYS

December 15, 2011

CERTIFIED MAIL
2011 4623

Lois Davis
c/o Darryl E. Scott, Esq.
Law Office of Darryl E. Scott
Attorney at Law
3730 Kirby Dr., Suite 1200
Houston, TX 77098

Re: EEOC Charge Against Fort Bend County
No. 31C201100556

Dear Ms. Davis:

Because you filed the above charge with the Equal Employment Opportunity Commission, and more than 180 days have elapsed since the date the Commission assumed jurisdiction over the charge, and no suit based thereon has been filed by this Department, and because you through your attorney have specifically requested this Notice, you are hereby notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq., against the above-named respondent.

If you choose to commence a civil action, such suit must be filed in the appropriate Court within 90 days of your receipt of this Notice.

The investigative file pertaining to your case is located in the EEOC San Antonio District Office, San Antonio, TX.

This Notice should not be taken to mean that the Department of Justice has made a judgment as to whether or not your case is meritorious.

Sincerely,

Thomas E. Perez
Assistant Attorney General
Civil Rights Division

by

/s/ Karen L. Ferguson
Karen L. Ferguson
Supervisory Civil Rights Analyst
Employment Litigation Section

cc: San Antonio District Office, EEOC
Fort Bend County

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION 4:12-CV-131

JURY TRIAL DEMANDED

LOIS M. DAVIS,

v.

FORT BEND COUNTY

EXHIBIT H

TO

DECLARATION OF LOIS M. DAVIS

U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION

NOTICE OF RIGHT TO SUE WITHIN 90 DAYS

December 15, 2011

CERTIFIED MAIL
2011 4623

Lois Davis
c/o Darryl E. Scott, Esq.
Law Office of Darryl E. Scott
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3730 Kirby Dr., Suite 1200
Houston, TX 77098

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Sincerely,

Thomas E. Perez
Assistant Attorney General
Civil Rights Division

by

/s/ Karen L. Ferguson
Karen L. Ferguson
Supervisory Civil Rights Analyst
Employment Litigation Section

cc: San Antonio District Office, EEOC
Fort Bend County

No. 18-525

IN THE
Supreme Court of the United States

FORT BEND COUNTY,
Petitioner,

v.

LOIS M. DAVIS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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Counsel for Petitioner

QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, requires plaintiffs to exhaust claims of employment discrimination with the EEOC before filing suit in federal court. *Id.* § 2000e-5(b), (f)(1). The question presented is:

Whether Title VII's administrative exhaustion requirement is a jurisdictional prerequisite to suit, as three Circuits have held, or a waivable claim-processing rule, as eight Circuits have held.

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IN THE

Supreme Court of the United States

No. 18-525

FORT BEND COUNTY,
Petitioner,

v.

LOIS M. DAVIS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

INTRODUCTION

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, requires aggrieved parties to file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) before proceeding to court. This exhaustion requirement ensures that the EEOC is able to investigate claims of employment discrimination before litigation occurs. It enables the Commission to uncover patterns and practices of discrimination, and to bring enforcement actions of its own. And it advances Congress's "preferred means" of resolving employment disputes:

through "[c]ooperation and voluntary compliance." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015) (internal quotation marks omitted).

The question presented is whether courts may assume jurisdiction over Title VII claims that were never brought before the EEOC. The better view is that they cannot. When Congress establishes "a statutory scheme of administrative and judicial review," it generally intends to "preclude[] *** jurisdiction" over claims that were not pressed through the requisite administrative channels. *Elgin* v. *Dep't of Treasury*, 567 U.S. 1, 8-10, 13 (2012). Title VII's painstakingly detailed administrative-review scheme makes it more than "fairly discernible" that Congress intended the statutorily specified means of obtaining judicial review to be "exclusive." *Id.* at 8-10. And the many system-related goals of the statute's exhaustion requirement—from protecting the EEOC's enforcement role to safeguarding the interests of state and local sovereigns—would be thwarted if the exhaustion requirement could be waived at the discretion of private litigants.

This Court has consistently held that a wide variety of statutory exhaustion requirements are jurisdictional prerequisites to suit. Title VII should not be an exception to that rule. The Fifth Circuit's judgment to the contrary should be reversed.

OPINIONS BELOW

The Fifth Circuit's opinion (Pet. App. 1a-15a) is reported at 893 F.3d 300. The District Court's opinion (Pet. App. 16a-38a) is not reported, and is available at 2016 WL 4479527. The Fifth Circuit's order

denying panel rehearing and rehearing en banc (Pet. App. 39a-40a) is not reported.

JURISDICTION

The Fifth Circuit entered judgment on June 20, 2018. Fort Bend County filed a timely petition for rehearing en banc, which was denied on July 20, 2018. Fort Bend County filed a petition for writ of certiorari on October 18, 2018, and this Court granted the petition on January 11, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the statutory addendum.

STATEMENT

A. Statutory Background

1. Congress enacted Title VII of the Civil Rights Act in 1964 to prohibit employment discrimination on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Congress envisioned a very particular means of eliminating discrimination from the workplace: Charges of discrimination should be resolved, if possible, through "[c]ooperation and voluntary compliance," rather than through the crucible of adversarial litigation. *Mach Mining*, 135 S. Ct. at 1651 (internal quotation marks omitted). To achieve that goal, Congress established an expert agency, the EEOC, with "[p]rimary responsibility" for eradicating discrimination. *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 61-62 (1984); *see* 42 U.S.C. § 2000e-5(a). And Congress required employees to present their claims of discrimination to the EEOC before proceeding to court themselves. *See Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

As initially designed, however, Congress's plan had a "major flaw": Title VII did not give the EEOC independent authority to file charges or bring civil complaints. *Gen. Tel. Co. of the Nw., Inc.* v. *EEOC*, 446 U.S. 318, 325 (1980) (quoting S. Rep. No. 92-415, at 4 (1971)). As a result, the agency's attempts at conciliation were often toothless, and employers "more often than not shrugged off the Commission's entreaties," confident that poorly resourced plaintiffs would be "unlikel[y]" to file suit or defeat them in court. H.R. Rep. No. 92-238, at 9 (1971).

To remedy this problem, in 1972 Congress amended Title VII to strengthen the EEOC's role. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, sec. 4, § 706(f)(1), 86 Stat. 103, 105. It granted the EEOC authority to file charges in its own right, thereby giving the agency the power to initiate investigations without waiting for an individual employee to file a charge. *See Alexander*, 415 U.S. at 44. In addition, Congress gave the EEOC the right of first refusal to file suit once the agency's efforts at conciliation failed, so that the EEOC rather than private plaintiffs would now "bear the primary burden of litigation." *Gen. Tel. Co.*, 446 U.S. at 326. Proponents of this amendment hoped that creating a more credible threat of enforcement "would [better] bring about effective voluntary compliance with the orders of the Commission." 117 Cong. Rec. 31970 (1971) (statement of Rep. Steiger). And they expected that litigation would be "the exception and not the rule," with "the vast majority" of cases resolved outside of court. 118 Cong. Rec. 7168 (1972) (Conf. Rep.).

2. Title VII now establishes "an integrated, multi-step enforcement procedure" that plaintiffs must undergo before filing suit. *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 359 (1977).

That process often begins at the state or local level. If an alleged act of discrimination takes place in a State or locality that has its own process for addressing employment discrimination, an employee must initiate those state or local proceedings first, and she must give the state or local authority time to address the issue. 42 U.S.C. § 2000e-5(c).

The federal administrative process then begins with the filing of a "charge" of discrimination with the EEOC. *Id.* § 2000e-5(b). A charge "is a signed statement asserting that an employer, union or labor organization engaged in employment discrimination." *Filing A Charge of Discrimination*, U.S. Equal Emp't Opportunity Comm'n.[1] Each charge must be "under oath or affirmation" and must "includ[e] the date, place and circumstances of the alleged unlawful employment practice." 42 U.S.C. § 2000e-5(b). In addition, the charge must be "sufficiently precise * * * to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b). A charge can be filed by "a person claiming to be aggrieved" or by the EEOC itself. 42 U.S.C. § 2000e-5(b).

Once a charge is filed, the EEOC is required to "serve a notice of the charge" on the employer and "make an investigation" of the allegations asserted in the charge. *Id.* During that investigation, the EEOC

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[1] *Available at* https://www.eeoc.gov/employees/charge.cfm (last visited Feb. 25, 2019).

is entitled to "have access to * * * any evidence of any person being investigated" that relates to the alleged discrimination. *Id.* § 2000e-8(a). It is also required to "accord substantial weight" to findings made by the "State or local authorities" during their own proceedings. *Id.* § 2000e-5(b).

If the EEOC determines "that there is not reasonable cause to believe that the charge is true," it must dismiss the charge. *Id.* If, however, the EEOC finds that reasonable cause for the charge exists, it must "endeavor to eliminate" the discriminatory employment practice "by informal methods of conference, conciliation, and persuasion." *Id.* The duty to attempt informal resolution of the complaint is "not precatory"; it is "a key component of the statutory scheme," which "serves as a necessary precondition to filing a lawsuit." *Mach Mining*, 135 S. Ct. at 1651.

If the EEOC fails to resolve a complaint through conciliation, the Federal Government may then proceed to court. Where the "respondent * * * named in the charge" is a private employer, the EEOC is empowered to bring a civil action. 42 U.S.C. § 2000e-5(f)(1). Alternatively, where the respondent is a government entity, the EEOC may refer the case to the Attorney General, who in turn may sue. *Id.* If either the EEOC or the Attorney General chooses to sue, the employee who filed the charge has "the right to intervene" in the action. *Id.*

An aggrieved employee may file suit herself only if, at the end of this process, the government declines to act—that is, only if a charge is dismissed by the EEOC, the EEOC fails to take action within a specified timeframe, or the EEOC or the Attorney General chooses not to sue and notifies the employee through

a "Right to Sue" letter. *Id.*; *see Filing a Lawsuit*, U.S. Equal Emp't Opportunity Comm'n.[2] At that point, "a civil action may be brought" by the aggrieved employee "against the respondent named in the charge." 42 U.S.C. § 2000e-5(f)(1). Federal courts are granted "jurisdiction of actions brought under" Title VII. *Id.* § 2000e-5(f)(3).

B. Factual And Procedural Background

1. Lois Davis worked as an information technology supervisor for Fort Bend County from 2007 to 2011. Pet. App. 17a n.2. In 2010, Davis informed the County's human resources department that the County's director of information technology had been sexually harassing her. *Id.* The County immediately placed Davis on paid leave and conducted an investigation that led to the IT director's resignation three weeks later. *Id.*; *see* J.A. 59.

In February 2011, Davis completed an "intake questionnaire" for the Texas Workforce Commission (TWC). J.A. 69. On that form, Davis specified that she wished to present allegations of "sexual harassment" and "retaliation." J.A. 73-74. Davis did not indicate in any way that she wished to complain of religious discrimination. *See id.* The TWC sent a letter to Davis, through her attorney, acknowledging her "intake questionnaire" and enclosing TWC charge forms. J.A. 102-104.

The next month, Davis filed a charge of discrimination with the TWC and the EEOC using the TWC

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[2] *Available at* https://www.eeoc.gov/employees/lawsuit.cfm (last visited Feb. 25, 2019).

charge form. J.A. 69.[3] On the charge, as on Davis's intake questionnaire, boxes were checked indicating that Davis wished to press claims based on "sex" and "retaliation," while the box next to "religion" was left blank. J.A. 80. The narrative section of the charge described the details of the alleged sexual harassment and retaliation against Davis, without any mention of religious discrimination. *Id.* And in the charge's "Discrimination Statement," Davis asserted only that "I believe I have been discriminated against * * * because of my gender/sex, female, and in retaliation for my complaint of harassment." *Id.* Davis signed this form under oath in the presence of a notary. *Id.*

While Davis's EEOC charge was pending, the County completed preparations to relocate its courthouse-related offices to its newly built County Justice Center. Pet. App. 18a n.2. The final relocation was scheduled for the long weekend of July 4, 2011, and the County told all technical support employees, including Davis, that they needed to be present to set up the County's computer system. *Id.* After repeated warnings that failure to attend would result in disciplinary action, Davis did not appear for the

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[3] The TWC and the EEOC have a Worksharing Agreement. *See* 29 C.F.R. § 1626.10 (authorizing EEOC to enter into worksharing agreements); 40 Tex. Admin. Code § 819.76 (providing that the TWC "shall enter into workshare agreements with EEOC"). Under this agreement, all complaints made with the TWC are automatically submitted to the EEOC. *See How to Submit an Employment Discrimination Complaint*, Tex. Workforce Comm'n, *available at* https://tinyurl.com/y2maaql6 (last updated Jan. 17, 2019).

scheduled move, and the County terminated her employment. *Id.*; *see* J.A. 85-86.

Davis recalls sending a modified "intake questionnaire" to the TWC and the EEOC sometime in the "late summer or fall of 2011." J.A. 71. Davis edited the questionnaire by handwriting the word "religion" next to a checklist labeled "Employment Harms or Actions." J.A. 90. Davis did not check the box for religious discrimination located on the first page of the intake questionnaire. *See* J.A. 89. She did not explain the meaning of the handwritten word "religion," and she did not describe the events surrounding her termination. The modified "intake questionnaire" does not reflect any edits indicating the date the alterations were made, and it is not signed under oath. J.A. 89-90. The actual EEOC charge was not altered in any way. *See* J.A. 99.

In November 2011, the TWC informed Davis, through her attorney, that the TWC had made a preliminary decision to dismiss her charge. J.A. 92-95. The TWC explained that "it cannot be established that the employer has discriminated against you based on Sex, Retaliation, or any other reason prohibited by the laws we enforce." J.A. 92. At the request of Davis's attorney, the TWC and the U.S. Department of Justice subsequently sent Davis letters informing her that she had a right to sue under Title VII. J.A. 97-98, 108-109.

2. In 2012, Davis sued Fort Bend County in the Southern District of Texas. In addition to claiming that County employees violated Title VII by allegedly retaliating against her for complaining of sexual harassment, J.A. 25, she claimed for the first time

that the County engaged in religious discrimination by requiring her to work on a Sunday, J.A. 22-24.

The District Court initially granted the County's motion for summary judgment on all counts. *Davis* v. *Fort Bend Cty.*, No. 4:12-CV-131, 2013 WL 5157191, at *7 (S.D. Tex. Sept. 11, 2013). The Fifth Circuit reversed in part, however, finding a "genuine dispute of material fact" as to whether the County had a sufficiently compelling reason for requiring Davis to work on a Sunday. *Davis* v. *Fort Bend Cty.*, 765 F.3d 480, 489 (5th Cir. 2014).

On remand, Davis amended her complaint to substantially expand her claim of religious discrimination. J.A. 44-49. The County moved to dismiss the claim, arguing that the district court lacked subject matter jurisdiction to consider this claim because Davis did not raise it in her EEOC charge. Pet. App. 21a-22a.

The District Court granted the motion to dismiss. *Id.* at 16a. It explained that Title VII's "exhaustion requirement is jurisdictional," and that Davis "failed to exhaust her administrative remedies regarding her religious discrimination claim." *Id.* at 37a. It noted that Davis "d[id] not mention religious discrimination" in her EEOC charge. *Id.* at 29a. Furthermore, it found that she did not sufficiently raise that claim before the EEOC by belatedly writing the single word "religion" on her intake questionnaire. Among other problems, "'an intake questionnaire does not constitute a charge'"; the amendment "was not under oath"; and there is "no evidence that Defendant was aware of [the] amendment." *Id.* at 29a-32a. Moreover, Davis "did not include any additional information or expla[nation]" alongside

the solitary word "religion," and—in light of the inadequacy of this amendment—the EEOC was not aware of and did not investigate any potential religious discrimination. *Id.* at 32a-34a. The District Court thus found it lacked jurisdiction to consider the religious discrimination claim. *Id.* at 37a.

The Fifth Circuit reversed. *Id.* at 1a.[4] After reviewing its own case law and the language of Title VII, the Fifth Circuit concluded that the statute's administrative exhaustion requirement is not jurisdictional. *Id.* at 12a. It also found that the County forfeited its exhaustion defense by failing to raise it earlier in the litigation. *Id.* at 15a.

This Court granted certiorari.

SUMMARY OF ARGUMENT

I. The Constitution grants Congress the power to define the contours of the federal courts' jurisdiction. Congress often exercises that power by allocating jurisdiction over a particular claim first to an expert agency and then to the federal courts. This Court has repeatedly held that when Congress creates such "a statutory scheme of administrative and judicial review," the scheme "preclude[s] district court jurisdiction" over claims that have not been presented to the agency if it is "fairly discernible" that Congress intended to limit jurisdiction. *Elgin*, 567 U.S. at 8-10 (quoting *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994)). In discerning Congress's intent, the Court looks to the "text, structure, and purpose" of the statute. *Id.* at 10. Where the text and structure set out an intricate statutory scheme, and where the

[4] Judge Jones concurred in the judgment only.

statute's core purposes would be frustrated by the absence of agency review, it is "fairly discernible" that Congress intended to make exhaustion a jurisdictional prerequisite to suit.

The text, structure, and purposes of Title VII make it "fairly discernible" that Congress intended to bar jurisdiction over claims that have not been presented to the EEOC. Title VII "sets out a detailed, multi-step procedure through which the [EEOC] enforces the statute's prohibition on employment discrimination." *Mach Mining*, 135 S. Ct. at 1649. The statutorily specified process is at least as "elaborate" and "comprehensive" as those deemed jurisdictional in the past. *Elgin*, 567 U.S. at 10-12 (internal quotation marks omitted). And Title VII's scheme brooks no exceptions; *every* individual must present her claims of employment discrimination to the EEOC in the first instance.

Moreover, the purposes of Title VII would be "seriously undermined" if the statute's exhaustion requirement was not jurisdictional. *Id.* at 14. In Title VII, Congress sought to remedy employment discrimination primarily through "[c]ooperation and voluntary compliance." *Mach Mining*, 135 S. Ct. at 1651 (internal quotation marks omitted). It also sought to give the EEOC the primary role in vindicating the public's interest in eradicating workplace discrimination. And it aimed to respect the principles of federalism by ensuring that state and local administrative bodies may play a part in the resolution of discrimination claims.

Each of these congressional purposes would be undermined if courts could assume jurisdiction over claims never presented to the EEOC. A claim cannot

be "administratively resolved" if a court begins adjudicating that claim before it has been submitted to the agency. Similarly, the EEOC cannot fulfill its central role in combatting employment discrimination and detecting patterns and practices of misconduct if courts may resolve discrimination claims that the EEOC knows nothing about. And allowing courts to exercise jurisdiction in the first instance would mean leapfrogging not only the EEOC, but also the state and local administrative proceedings that must be initiated before EEOC review.

This Court's decision in *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), is fully consistent with the proposition that Title VII's exhaustion requirement is jurisdictional. *Zipes* held that Title VII's statutory deadline for seeking administrative review is non-jurisdictional. *Id.* at 398. It did not address the statute's exhaustion requirements, and its reasoning was specific to the text, legislative history, and precedent governing the timing requirement. Furthermore, statutes often contain a non-jurisdictional timeliness provision and a jurisdictional exhaustion requirement, in light of the fact that the two types of requirements have very different common law backdrops, purposes, and equitable implications. That Title VII permits equitable tolling of its timing requirement does not suggest that courts may assume jurisdiction over claims that have not been presented to the EEOC at all.

II. Outside of the exhaustion context, this Court has often applied a "clear statement" analysis to decide whether a statutory requirement is jurisdictional. That analysis does not apply here: This Court has repeatedly said that it need only be "fairly

discernible" that Congress intended to strip jurisdiction of claims that have not been presented to an administrative body. In any event, Title VII contains a "clear statement" that its exhaustion requirement is jurisdictional.

Title VII's "text" and "structur[e]" make plain that exhaustion is a jurisdictional prerequisite to suit. *United States* v. *Kwai Fun Wong*, 135 S. Ct. 1625, 1632-33 (2015). The statute's intricate scheme sets forth the exclusive way that Congress wished federal courts to assume jurisdiction. The exhaustion requirement is housed in the section of the statute captioned "jurisdiction," and it is tightly linked to the statute's explicit jurisdictional grant. And there is no exception to the requirement that every discrimination claim must first be presented to the agency in the form of a "charge."

Title VII's exhaustion requirement is also designed to advance "broader system-related goal[s]"—a hallmark of a jurisdictional rule. *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133 (2008). The exhaustion requirement "facilitat[es] the administration of" discrimination claims, "limit[s] the scope of [the] governmental waiver of sovereign immunity" for state and federal employers, and "promot[es] judicial efficiency" by reducing the number of Title VII claims that end up in court. *Id.*

Finally, the "context" provided by this Court's prior interpretation of Title VII's exhaustion requirement and similar requirements in other statutes confirms that exhaustion is a jurisdictional prerequisite. *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013). This Court has long described Title VII's exhaustion requirement as jurisdictional; although

the Court has sometimes deemed other Title VII requirements non-jurisdictional, it has not disturbed that basic holding. Further, in case after case, the Court has held that statutory exhaustion requirements are jurisdictional, even when the text is silent on that issue.

III. Because Title VII's exhaustion requirement is jurisdictional, the district court correctly dismissed Davis's religious discrimination claim. Davis did not present that claim to the EEOC in her charge, and the expert agency gave no indication that it investigated her religious discrimination claim or even was aware of it. Permitting the courts to assume jurisdiction in this circumstance would undermine Congress's carefully constructed scheme of administrative and judicial review. The judgment of the Fifth Circuit should be reversed.

ARGUMENT

I. TITLE VII'S INTEGRATED SCHEME OF ADMINISTRATIVE AND JUDICIAL REVIEW IS THE EXCLUSIVE MEANS THROUGH WHICH COURTS MAY OBTAIN JURISDICTION OVER A CLAIM.

Article III of the Constitution sets the basic contours of judicial authority in our tripartite system, but the Constitution gives Congress the power to further define those contours by deciding what cases and controversies will come within the jurisdiction of the federal courts. Congress's authority over federal jurisdiction is "an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain

subjects." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 101 (1998).

In the last century, as the administrative state has grown, Congress has frequently exercised its constitutional authority in this realm to allocate jurisdiction between Article III courts and administrative bodies. In performing that task, Congress has sometimes elected to deprive Article III courts of jurisdiction altogether, committing the resolution of certain issues exclusively to an administrative agency. *See, e.g.*, *Switchmen's Union of N. Am.* v. *Nat'l Mediation Bd.*, 320 U.S. 297, 301-302 (1943) (holding that courts lack jurisdiction to review certain claims under the Railway Labor Act because Congress entrusted review exclusively to an administrative board). More often, Congress has adopted a nuanced approach, vesting authority in an agency in the first instance, and then shifting jurisdiction to the federal courts. *See, e.g.*, *Elgin*, 567 U.S. at 9; *Thunder Basin*, 510 U.S. 200.

Title VII establishes just such a jurisdiction-shifting scheme for the resolution of claims of employment discrimination: It requires that a "charge" of employment discrimination first be "filed" with the EEOC. 42 U.S.C. § 2000e-5(b). The statute then "grant[s] the EEOC exclusive jurisdiction over the claim for 180 days." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 288 (2002); 42 U.S.C. § 2000e-5(f)(1). During that period, the EEOC must notify the employer and investigate the charge. 42 U.S.C. § 2000e-5(b). "If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate" the alleged practice "by

informal methods of conference, conciliation, and persuasion." *Id.*

Once the EEOC has had the opportunity to resolve the charge through these "informal methods," jurisdiction shifts to the courts, either in the form of a suit brought by the Government or in a private action: If the EEOC believes a charge is true but is unable to resolve the charge itself, it "may bring a civil action against" a non-governmental respondent, or it may "refer the case to the Attorney General" to "bring a civil action against" a governmental defendant. *Id.* 2000(e)-5(f)(1). Alternatively, if the EEOC dismisses a charge or otherwise fails to resolve the claim or bring suit within 180 days, "a civil action may be brought against the respondent named in the charge * * * by the person claiming to be aggrieved." *Id.* "Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under" these provisions. *Id.* 2000(e)-5(f)(3).

This statutory scheme leaves no room to doubt that federal courts have jurisdiction over Title VII claims that have been brought through the statutorily mandated administrative process. The question in this case is whether a court may also exercise authority over a charge that has never been presented to the EEOC. The answer is no: When Congress creates "a statutory scheme of administrative and judicial review," that scheme "preclude[s] district court jurisdiction" over claims that have not been presented to the agency in the first instance so long as the "text, structure, and purpose" of the statute make it "fairly discernible" that Congress intended to

limit jurisdiction. *Elgin*, 567 U.S. at 8-10 (internal quotation marks omitted). The text, structure, and purpose of Title VII make it abundantly clear that Congress intended to grant courts jurisdiction exclusively over claims that have been presented to the EEOC in the first instance.

A. A Statutory Scheme Of Administrative And Judicial Review Typically Strips Courts Of Jurisdiction Over Claims That Have Not Been Presented To The Agency.

"Generally, when Congress creates procedures 'designed to permit agency expertise to be brought to bear on particular problems,' those procedures 'are to be exclusive.'" *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010) (quoting *Whitney Nat'l Bank in Jefferson Parish* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965)). Accordingly, when faced with claims that have not been presented through a statutorily mandated administrative scheme, this Court has held that jurisdiction is lacking so long as "the 'statutory scheme' displays a 'fairly discernible' intent to limit jurisdiction." *Id.* at 489 (quoting *Thunder Basin*, 510 U.S. at 207).

Thus, in *Thunder Basin*, the Court held that "the Mine Act's comprehensive enforcement and administrative review scheme precluded district court jurisdiction over petitioner's claims" because those claims had not been pressed through the administrative scheme. 510 U.S. at 206, 216. The Mine Act, the Court explained, "establishes a detailed structure" for administrative review of alleged violations of health and safety standards, and "[n]othing in the language and structure of the Act or its legislative

history suggests that Congress intended to allow [petitioner] to evade the statutory-review process." *Id* at 207, 216. "To uphold the District Court's jurisdiction" over claims that were never presented to the administrative agency, the Court concluded, "would be inimical to the structure and the purposes of the * * * Act." *Id.* at 216.

Similarly, in *Free Enterprise Fund*, this Court considered "whether the District Court had jurisdiction" to consider a claim that was brought outside of the Sarbanes-Oxley Act's scheme for administrative and judicial review. 561 U.S. at 489. The Court reaffirmed that "[g]enerally" such statutory schemes "limit jurisdiction" with respect to covered claims, particularly where the claims implicate the "competence and expertise" of the agency charged with initial review. *Id.* at 489, 491. The Court held that the *Free Enterprise Fund* petitioners could skip that review scheme only because the claim in question—a facial constitutional challenge to the agency's for-cause removal structure—was "wholly collateral to [the] statute's review provisions" and "outside the agency's expertise." *Id.* at 489-490 (internal quotation marks omitted).

Two years later, in *Elgin*, the Court reaffirmed that "a statutory scheme of administrative and judicial review" strips a court of jurisdiction over claims that have not been presented to the agency so long as "it is 'fairly discernible' that Congress precluded district court jurisdiction over [such] claims." 567 U.S. at 8-10. The Court held that the "'elaborate' framework" of the Civil Service Reform Act (CSRA) and the statute's "objective of creating an integrated scheme of review" demonstrated "Congress' intent to entirely

foreclose judicial review" over claims by federal employees challenging adverse employment actions unless the claims were first presented to an expert agency. *Id.* at 10-11, 14. Moreover, the *Elgin* Court emphasized the strength of this "jurisdictional rule": Even where the agency lacks the authority to resolve an employee's constitutional claims, the Court held, the employee is nonetheless required to present the claims to the agency as a prerequisite to any judicial review. *Id.* at 15.

Together, *Thunder Basin*, *Free Enterprise Fund*, and *Elgin* articulate a straightforward rule: Where Congress establishes "a statutory scheme of administrative and judicial review," district courts lack jurisdiction over any claim that has not been presented to the agency so long as it is "fairly discernible" that Congress intended to "limit jurisdiction" in this way. And it is generally "fairly discernible" that Congress intended to limit jurisdiction where the statutory scheme is "integrated" and "comprehensive," where it vests authority in a federal agency with "competence and expertise" over the claims at issue, and where deeming the requirement non-jurisdictional "would be inimical to * * * the purposes of the * * * Act."

Moreover, even in cases where the Court has not explicitly invoked this rule, it has held that Congress erects a jurisdictional limit on the authority of the courts when it mandates that an issue be presented to an expert agency in the first instance. For example, in *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645 (1982), the Court held that a provision in the National Labor Relations Act (NLRA) barring consideration of an objection "that has not been

urged before the [National Labor Relations] Board" dictates that courts "lack[] jurisdiction to review objections" that have not been presented to the Board. *Id.* at 665-666 (internal quotation marks omitted); *see Sims* v. *Apfel*, 530 U.S. 103, 108 (2000) (reiterating that courts "lack[] jurisdiction to review objections not raised before the National Labor Relations Board"). More broadly, this Court has held that plaintiffs may not "invoke federal jurisdiction" over certain NLRA claims that have not been presented to the NLRB in the "first instance" because Congress has given "primary jurisdiction" to the National Labor Relations Board. *Marquez* v. *Screen Actors Guild, Inc.*, 525 U.S. 33, 49-50 (1998); *see also San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245-246 (1959).

Likewise, the Court has held that a provision in the Social Security Act that authorizes a plaintiff to file "a civil action" only "after [a] final decision of the Commissioner," 42 U.S.C. § 405(g), creates a "nonwaivable jurisdictional requirement that a claim for [Social Security] benefits shall have been presented to the Secretary." *Heckler* v. *Day*, 467 U.S. 104, 110 n.14 (1984); *see Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975) (same); *Mathews* v. *Eldridge*, 424 U.S. 319, 328 (1976) (same). And in *McNeil* v. *United States*, 508 U.S. 106 (1993), the Court upheld the lower court's jurisdictional dismissal of a suit that failed to comply with a statutory exhaustion provision in the Federal Tort Claims Act. *See id.* at 111 (suggesting that compliance with this requirement is a "necessary predicate[] to the invocation of the court's jurisdiction"). Other precedents stretching back decades are to the same effect. *See Fed. Power Comm'n* v. *Colorado Interstate Gas Co.*, 348

U.S. 492, 498-499 (1955); *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540, 544-545 (1946).

The administrative review schemes deemed jurisdictional in these cases come in many different forms. Some, like the CSRA scheme at stake in *Elgin*, mandate "proper exhaustion": They require a litigant to present her claim through several levels of adversarial administrative processes until she receives a final decision from the agency. *Woodford* v. *Ngo*, 548 U.S. 81, 90 (2006). Others, like the FTCA requirement at stake in *McNeil*, simply require a litigant to present her claim to an administrative body; they permit suit after a certain period of time even if the agency has not "ma[d]e final disposition of [the] claim." 28 U.S.C. § 2675(a).[6] Further, whereas some of these provisions channel jurisdiction exclusively into a single court, *see Elgin*, 567 U.S. at 6 (CSRA), others permit jurisdiction in any appropriate district court, *e.g.*, *Salfi*, 422 U.S. at 763 (Social Security Act), or court of appeals, *e.g.*, *Thunder Basin*, 510 U.S. at 204 (Mine Act).

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[6] As the *Woodford* Court observed, Title VII's so-called exhaustion provision properly falls in this bucket because it does not require a litigant to obtain a final administrative decision. 548 U.S. at 99. Instead, it requires the litigant to present her claim to the EEOC, and it mandates that she give the agency 180 days to attempt to resolve the claim informally before a civil action may be "brought" against the respondent. 42 U.S.C. § 2000e-5(f)(1). But despite the fact that the relevant Title VII provision does not demand "proper exhaustion," *Woodford*, 548 U.S. at 90, it is commonly referred to as an exhaustion requirement. Accordingly, Fort Bend County adopts that terminology throughout.

But all of these review schemes follow the same basic rule: They appear in a statute that mandates administrative and then judicial review; and the text, structure, and purpose of the statutory scheme make it "fairly discernible" that Congress intended to limit courts' jurisdiction to claims that have been presented to an expert agency in the first instance.

B. Title VII Sets Out An Intricate Scheme Of Administrative And Judicial Review That Bars Jurisdiction Over Claims That Have Not Been Pressed Before The EEOC.

Applying this framework to Title VII leads to the inevitable conclusion that the statute bars jurisdiction over an employment discrimination claim that has not been presented to the EEOC. *Elgin*, 567 U.S. at 15. The statute creates an integrated "scheme of administrative and judicial review," in which a charge of employment discrimination is first filed with the EEOC, and later brought to the courts if the EEOC is unable to satisfactorily resolve the charge on its own. *Id.* at 8. And the "text, structure and purpose" of Title VII make it "fairly discernible" that Congress intended to deprive courts of jurisdiction over claims that have not been presented to the agency through this scheme. *Id.* at 10 (internal quotation marks omitted).

1. As to the "text and structure," this Court's precedents teach that where a statute sets out a "detailed" administrative process culminating in judicial review, the intricacy of the scheme provides strong evidence of a congressional intent to limit jurisdiction. *Thunder Basin*, 510 U.S. at 207. For example, the *Elgin* Court held that "[g]iven the painstaking detail with which the CSRA sets out the method for

covered employees to obtain review of adverse employment actions, it is fairly discernible that Congress intended" to impose a jurisdictional bar on claims brought directly to the district courts. 567 U.S. at 11-12; *see also Thunder Basin*, 510 U.S. at 207-209 (statute's "detailed structure" and "comprehensive review process" indicate intent to preclude review); *Whitney Nat'l Bank*, 379 U.S. at 420 ("carefully planned and comprehensive" scheme shows that courts may review claims "solely as provided in the statute").

The same "painstaking detail" is on display in Title VII. The statute "sets out a detailed, multi-step procedure through which the Commission enforces the statute's prohibition on employment discrimination." *Mach Mining*, 135 S. Ct. at 1649; *see Occidental Life*, 432 U.S. at 359 (Title VII establishes "an integrated, multistep enforcement procedure"). Indeed, Congress devoted paragraphs and paragraphs of dense statutory text to describing the exact process that should occur when an employee raises a claim of employment discrimination.

To take just a small sampling of the intricate commands the statute contains: Before a claim is even presented to the EEOC, "proceedings" must be "commenced" before any state or local authority that might be able to provide relief. 42 U.S.C. § 2000e-5(c). When the claim is brought to the EEOC, it must be in the form of a "charge" that is "in writing under oath or affirmation," and the charge must "contain such information and be in such form as the Commission requires." *Id.* § 2000e-5(b). The EEOC must "serve a notice of the charge (including the date, place and circumstances of the alleged unlawful

employment practice)" on the employer "within ten days." *Id.* The Commission must also make "an investigation," during which it must have access to statutorily specified evidence. *Id.*; *see id.* §§ 2000e-8, 2000e-9 (prescribing details of Commission's investigatory powers and the evidence to which it is entitled). Over the course of the investigation, the agency is permitted to wield "all of the powers conferred upon the National Labor Relations Board by 29 U.S.C. § 161, including the authority to issue subpoenas and to request judicial enforcement of those subpoenas." *Shell Oil Co.*, 466 U.S. at 63 (citing 42 U.S.C. § 2000e-9).

After the EEOC's investigation is concluded, it must decide whether there is "reasonable cause to believe that the charge is true." 42 U.S.C. § 2000e-5(b). If the EEOC determines that reasonable cause exists, it must engage in "conference, conciliation and persuasion" in an attempt to obtain a private, "informal" resolution of the charge. *Id.* A judicial action may be filed by the Commission only if it has been "unable to secure from the respondent a conciliation agreement acceptable to the Commission." *Id.* § 2000e-5(f)(1). If a respondent believes the Commission has not made a good faith effort to obtain conciliation, it may press that as a defense to an EEOC suit. *Mach Mining*, 135 S. Ct. at 1651. Finally, a judicial action may be filed by the "person aggrieved" if the EEOC fails to resolve the charge through conciliation or litigation within 180 days or if the Commission dismisses the charge altogether. 42 U.S.C. § 2000e-5(f)(1).

As was true in *Thunder Basin* and *Elgin*, Congress's decision to laboriously spell out the precise

administrative process that precedes judicial review demonstrates that Congress intended to "preclude * * * jurisdiction" over Title VII claims that have not been presented to the EEOC. *Elgin*, 567 U.S. at 9-10. Congress would hardly have set out a detailed administrative scheme through which a litigant may obtain judicial review if it intended for courts to assume jurisdiction over claims that have not been presented to the agency *at all*.

Moreover, Title VII's review scheme is not only elaborate; it is "comprehensive." *Id.* at 10 (quoting *United States* v. *Fausto*, 484 U.S. 439, 448 (1988)). *Every* category of employee—private, local, state, and federal—must present *every* claim of an unlawful employment practice through the statute's finely wrought administrative review process. *See* 42 U.S.C. § 2000e-5(b), (f)(1); *id.* § 2000e-16; *Nat'l R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 113 (2002) (employee must file a timely charge regarding each "discrete discriminatory act"). Congress did not include any exceptions permitting employees to skip the administrative process and go straight to federal court.[6] "That Congress declined to include an exemption" from its comprehensive review scheme "indicates that Congress intended no such exception." *Elgin*, 567 U.S. at 13.

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[6] 42 U.S.C. § 2000e-6 permits the Commission itself to bring "pattern or practice" claims against an employer, and grants jurisdiction over such claims in a three judge panel if the employer so chooses. But that is hardly an exception to the rule that all Title VII claims must first pass through the agency since it is the agency itself that must bring the pattern or practice complaint.

What is more, the resolution of Title VII claims falls "squarely within the [Commission's] expertise." *Free Enter. Fund*, 561 U.S. at 491 (quoting *Thunder Basin*, 510 U.S. at 214-215). As the *Free Enterprise Fund* Court observed, the inference that Congress intended to strip courts of jurisdiction is at its zenith where the claims in question are within an agency's "competence and expertise." *Id.* By channeling claims to the EEOC, Title VII requires claimants to bring employment discrimination charges before the agency whose entire *raison d'etre* is the eradication of workplace discrimination.

2. The congressional purposes embodied in the Title VII scheme further confirm that presenting a claim to the agency is a jurisdictional prerequisite to judicial review. In *Elgin*, this Court found "support" for the proposition that the CSRA creates a jurisdictional rule in the fact that the statute's "purpose"—namely, "creating an integrated scheme of review" and avoiding "simultaneous proceedings" and "inconsistent decisionmaking"—"would be seriously undermined if * * * a covered employee could challenge a covered employment action first in a district court." 567 U.S. at 13-14; *see also Thunder Basin*, 510 U.S. at 216 (finding a "'fairly discernible' intent to preclude district court review" based in part on Congress's "clear concern with channeling and streamlining the enforcement process"). By the same token, permitting courts to exercise jurisdiction over Title VII claims that have not been presented to the EEOC would "seriously undermine[]" at least three of the major purposes of the statute: (1) encouraging the resolution of discrimination claims out of court; (2) enabling the EEOC to root out employment discrimination; and (3) respecting federalism.

First, allowing employees to circumvent the administrative process would undermine Congress's objective of encouraging non-judicial resolution of employment discrimination claims. When it enacted Title VII, Congress "selected cooperation and voluntary compliance *** as the preferred means for achieving the goal of equality of employment opportunities." *Occidental Life*, 432 U.S. at 367-368 (internal quotation marks and alteration omitted); *see also Mach Mining*, 135 S. Ct. at 1651 ("In pursuing the goal of bringing employment discrimination to an end, Congress chose cooperation and voluntary compliance as its preferred means." (internal quotation marks and alterations omitted)). Title VII therefore codifies a "federal policy" in favor of ensuring that "whenever possible," claims are "administratively resolved before suit is brought in a federal court." *Occidental Life*, 432 U.S. at 368.

Permitting a district court to exercise jurisdiction over a claim that has never been presented to the EEOC would thwart this federal policy. There is no chance that a claim will be "administratively resolved before suit is brought in a federal court," *id.*, if the EEOC is not even made aware of a charge before it is included in a judicial complaint. Just as in *Elgin* and *Thunder Basin*, Congress's aim of "streamlining the enforcement process" and enabling the resolution of employment-discrimination claims out of court is inconsistent with construing the statute to vest jurisdiction in courts before the administrative process has even begun. *Thunder Basin*, 510 U.S. at 216.

Second, allowing courts to adjudicate claims that have not been presented to the EEOC would under-

mine the statutory role of the EEOC itself. This Court has often observed that "the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties." *Occidental Life*, 432 U.S. at 368; *see Gen. Tel. Co.*, 446 U.S. at 325-326. Rather, Congress specifically amended the statute in 1972 to empower the EEOC "to bring its own enforcement actions" and to give the EEOC the right of first refusal to sue on any private claims of employment discrimination. *Waffle House*, 534 U.S. at 286; *see* 42 U.S.C. § 2000e-5(f)(1). This important revision to the statute ensured that the agency could not only "bring about more effective enforcement of private rights," but also "vindicate the *public* interest in preventing employment discrimination"—for instance, by suing to halt a "pattern or practice" of discrimination it uncovers in the course of its investigation of the specific charge an employee raises. *Gen. Tel. Co.*, 446 U.S. at 326-327 (emphasis added).

Indeed, the EEOC's independent role is so important that, in *Waffle House*, this Court held that Title VII precludes parties from entering into a private arbitration agreement that prevents the EEOC from engaging in litigation against the defendant. The Court explained that such an agreement "would undermine the detailed enforcement scheme created by Congress" by prohibiting the EEOC from fulfilling its statutory role in "vindicat[ing] the public interest." 534 U.S. at 296 & n.11.

It is equally clear that the EEOC's role in eradicating workplace discrimination would be "undermine[d]" if courts could assume jurisdiction over claims that have not been presented to the agency. That would deprive the EEOC of its "primary role" in

litigating Title VII claims, and it would strip the agency of its right of first refusal to bring suit before an individual claimant. Moreover, it would impede the EEOC's ability to bring pattern-or-practice claims against employers that have repeatedly violated the Act's anti-discrimination provisions. For example, if a court assumes jurisdiction over a claim of gender discrimination that has not been presented to the EEOC, it will be more difficult for the agency to recognize the "pattern or practice" of gender discrimination when another woman files an EEOC gender discrimination charge against the same employer. And that difficulty is only enhanced by the prevalence of private settlements used to end litigation of this kind.

What is more, only a "jurisdictional rule" will ensure that the EEOC's interests are vindicated. The EEOC itself is rarely a party to suits brought by individual employees, and so it cannot raise a failure-to-exhaust defense. Title VII defendants are unlikely to raise the issue themselves because an employer typically has little incentive to ensure that a plaintiff's claims have been presented to the EEOC. Indeed, an employer that is litigating against a poorly resourced plaintiff, or that is engaged in a pattern or practice of discrimination, will most likely prefer that the claims against it are never brought to the attention of the Commission, which may subject it to harsher scrutiny. *See Kremer* v. *Chem. Constr. Corp.*, 456 U.S. 461, 474 & n.15 (1982) (noting that when Title VII was enacted, some feared "overzealous enforcement by the EEOC"). Expecting the defendant to protect the EEOC's role by raising a failure-to-exhaust defense is therefore akin to trusting the fox to guard the hens. Only by requiring

courts to review and enforce the statute's exhaustion requirement can the Court ensure that the EEOC's statutory prerogatives are protected.

Third, permitting courts to exercise jurisdiction over claims that have not been presented to the EEOC would undercut Congress's intention to respect principles of federalism within the Title VII scheme. In enacting the statute, "[m]embers of Congress agreed that the States should play an important role." *Kremer*, 456 U.S. at 472. Congress believed that "remedying employment discrimination would be an area in which '[t]he Federal Government and the State governments could cooperate effectively.'" *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 63-64 (1980) (quoting 110 Cong. Rec. 7205 (1964) (statement of Sen. Clark)). To that end, Title VII provides that when a State or local authority has established its own remedy for employment discrimination, no charge may be reviewed by the EEOC until the state remedy has been invoked and at least 60 days have passed, "unless such proceedings have been earlier terminated." 42 U.S.C. § 2000e-5(c). And, when the EEOC does begin its investigation, it is required to "accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law." *Id.* § 2000e-5(b). "It is clear from this scheme of interrelated and complementary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination." *New York Gaslight Club*, 447 U.S. at 65.

When courts assume jurisdiction over claims that have not been presented to the EEOC, they override

Congress's carefully constructed system of cooperative federalism. The statutory mandate that a litigant pursue state proceedings before the EEOC may investigate her claim is ineffectual if the litigant is permitted to leapfrog the EEOC review process and anything that comes before it. And directing the EEOC to "accord substantial weight" to state findings does no good if the EEOC is cut out of the process.

In short, because the federal policies embodied in Title VII cannot be achieved unless employment discrimination claims are presented to the EEOC, Congress must have intended for the exhaustion requirement to be jurisdictional. *See Webb* v. *Bd. of Educ. of Dyer Cty.*, 471 U.S. 234, 248 (1985) (Brennan, J., concurring in part and dissenting in part) ("Where Congress requires resort to administrative remedies as a predicate to invoking judicial remedies, the administrative remedies obviously are integral 'to enforce[ment of] a provision' of the civil rights laws."). Only a jurisdictional rule can ensure that exhaustion occurs in every case, regardless of whether the litigants prefer to avoid the EEOC entirely. *See Kremer*, 456 U.S. at 474 (quoting legislative history suggesting Congress's belief that defendants would prefer judicial resolution of discrimination claims); *Waffle House*, 534 U.S. at 297-298 (recognizing that individual litigants might enter contracts that seek to reduce the EEOC's role).

C. *Zipes* Does Not Support A Contrary Conclusion.

Despite the ample evidence that Title VII's statutory scheme bars jurisdiction over claims that have not been presented to the EEOC in the first instance,

several courts of appeals—including the Fifth Circuit below—have concluded that *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), dictates that the EEOC's exhaustion requirement is non-jurisdictional. Those courts are incorrect. *Zipes* addressed the jurisdictional status of Title VII's timeliness requirement, not its exhaustion requirement, and the *Zipes* Court deemed the timeliness requirement non-jurisdictional for reasons that have no application to the statute's exhaustion provision. Furthermore, this Court has often deemed statutory timing requirements non-jurisdictional while treating associated exhaustion requirements as jurisdictional, in light of the very different legal backdrops, purposes, and equitable implications of the two types of requirements.

1. *Zipes* concerned a class action complaint brought by female stewardesses who lost their jobs when they became mothers. *Id.* at 388. Although the plaintiff class had filed an EEOC charge before bringing suit, the statutory time limit for filing that charge had already lapsed for many of the women because they had been terminated long before the claim was presented to the EEOC. *Id.* at 388-389 & n.2; *see* 42 U.S.C. § 2000e-5(e)(1). The court of appeals excluded those individuals from the class, reasoning that their claims were "jurisdictionally barred" by their failure to "file[] charges of discrimination with the EEOC within 90 days of the alleged unlawful employment practice." 455 U.S. at 390. The question presented to this Court was "whether the *timely* filing of an EEOC charge is a jurisdictional prerequisite to bringing a Title VII suit." *Id.* at 392 (emphasis added).

The Court answered that question in the negative: "[C]ompliance with the filing period," it held, is "not a jurisdictional prerequisite to filing a Title VII suit." *Id.* at 398. The Court explained that "[t]he provision specifying the time for filing charges with the EEOC"—42 U.S.C. § 2000e-5(e)—"appears as an entirely separate provision" from the statute's jurisdictional grant. 455 U.S. at 393-394. It also explained that several statements in the legislative history referred to the timeliness provision as "a statute of limitations," which is typically deemed non-jurisdictional. *Id.* And the Court's prior cases had repeatedly "referred to the provision as a limitations statute" and treated it as such. *Id.* at 395-396 (citing *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 771 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975)). For all these reasons, the Court viewed the timeliness requirement as non-jurisdictional.

But all of those reasons are germane solely to the statute's timeliness requirement. They have no application to the distinct question of whether jurisdiction is barred where an employee has not filed a claim with the EEOC *at all*. The exhaustion requirement is established through different statutory text; it bears no resemblance to a statute of limitations; and it has repeatedly been interpreted as jurisdictional. *See infra* pp. 42, 48-49. Thus, while the Court has sometimes loosely referred to *Zipes* as holding that "Title VII's EEOC filing requirement was nonjurisdictional," *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 169 n.8 (2010); *Union Pac. R.R. Co.* v. *Bhd. of Locomotive Eng'rs*, 558 U.S. 67, 83 (2009), there is no question that the case's holding is confined to the "*timely* filing" requirement. *Zipes*, 455 U.S. at 393 (emphasis added).

Indeed, the *Zipes* Court could not have issued a holding with respect to the jurisdictional nature of the exhaustion requirement because the "plaintiff class filed its charge with the EEOC" before initiating suit. *In re Consol. Pretrial Proceedings*, 582 F.2d 1142, 1147 (7th Cir. 1978). The only question was whether that charge came too late for some of the class members. *Id.* at 1147-48. Accordingly, this Court's more recent precedents have correctly referred to *Zipes* as a case about the jurisdictional nature of a time bar. *See, e.g.*, *Green* v. *Brennan*, 136 S. Ct. 1769, 1778 (2016) (describing *Zipes* as concerning "the Title VII limitations period"); *Wong*, 135 S. Ct. at 1633 n.4 (characterizing *Zipes* as "concluding that a time limit did not speak in jurisdictional terms" (internal quotation marks omitted)).

2. Nor is there any other reason to assume that the non-jurisdictional nature of Title VII's timeliness requirement necessarily extends to the statute's exhaustion requirement. This Court has often held that the time limits for administrative review specified in a statute are non-jurisdictional, while also holding that the failure to present a claim to the agency *at all* is fatal to a court's jurisdiction. For example, this Court has held that the NLRA bars jurisdiction over certain claims and objections that have not been presented to the National Labor Relations Board. *Marquez*, 525 U.S. at 49-50; *Woelke*, 456 U.S. at 665. But the *Zipes* Court itself explained that the "time requirement for filing an unfair labor practice charge under the National Labor Relations Act operates as a statute of limitations subject to recognized equitable doctrines and not as a restriction of the jurisdiction of the National Labor Relations Board." 455 U.S. at 395 n.11. This

example is particularly significant because—as *Zipes* explained—"the National Labor Relations Act was the model for Title VII's remedial provisions." *Id.* (internal quotation marks omitted); *see also* 42 U.S.C. § 2000e-9 (explicitly incorporating NLRA provisions into Title VII).

Other statutes follow the same pattern, featuring a non-jurisdictional time limit and a jurisdictional exhaustion requirement. Thus, in *Salfi*, the Court held that the statutory time limit for filing a civil action under the Social Security Act is "a statute of limitations," and "[a]s such, * * * waivable by the parties." 422 U.S. at 763-764. Yet the Court simultaneously held that the statutory requirement to present a claim to the administrative body is a "jurisdictional prerequisite." *Id.* at 764, 766. Likewise, in *Kwai Fun Wong*, the Court determined that the time requirements for administrative and judicial review in the Federal Tort Claims Act are non-jurisdictional, 135 S. Ct. at 1638, without disturbing its earlier decision affirming the jurisdictional dismissal of an FTCA claim that had not been presented to the agency at all, *McNeil*, 508 U.S. at 108, 113. Nor was this a mere oversight: *McNeil*'s treatment of the exhaustion requirement as jurisdictional was discussed by the parties in their briefing and referenced at oral argument. *See* Tr. of Oral Argument at 27-29, *McNeil*, 508 U.S. 106 (No. 92-6033), 1993 WL 751850; U.S. Br. at 15-16, *McNeil*, 508 U.S. 106 (No. 92-6033), 1993 WL 347205. Yet the Court never hinted that its decision in *Wong* had any effect on *McNeil*.

3. This widespread distinction between the treatment of statutory time limits and exhaustion re-

quirements reflects a fundamental difference in the Court's interpretive approach to the two types of provisions: The Court has long applied a "rebuttable presumption" that Congress intends to make timeliness requirements non-jurisdictional, *Wong*, 135 S. Ct. at 1631, while simultaneously holding that exhaustion is a jurisdictional prerequisite so long as Congress has made that intent "fairly discernible," *Elgin*, 567 U.S. at 10-12. That makes sense because the two different types of requirements implicate different common-law backdrops, serve different purposes, and have different equitable implications.

To begin, statutory time limits and exhaustion provisions are enacted against very different legal backdrops. The principle that statutory time limits are subject to equitable tolling and therefore *non*-jurisdictional is "a long-established feature of American jurisprudence derived from 'the old chancery rule.'" *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 10-11 (2014). Based on this common-law rule, courts presume that Congress intended equitable tolling to apply so long as it is "consistent with the statute." *Id.* at 11; *see Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) (Congress "legislate[s] against a background of common-law adjudicatory principles").

The opposite is true with respect to exhaustion. In 1945, the Court was already able to point to a "long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Levers* v. *Anderson*, 326 U.S. 219, 222 (1945) (internal quotation marks omitted). And the Court's practice has long been to construe

statutory exhaustion requirements strictly, "refusing to add unwritten limits onto their rigorous textual requirements" and "rejecting every attempt to deviate *** from [their] textual mandate[s]." *Ross* v. *Blake*, 136 S. Ct. 1850, 1857 (2016).

In other words, while courts have historically used their equitable discretion to create exceptions to statutorily mandated time limits, they have long "refus[ed]" to exercise the same authority with respect to statutory exhaustion mandates. Given that backdrop, it is reasonable to assume that Congress expects its statutory deadlines to be enforced flexibly, while expecting its exhaustion requirements to be enforced as jurisdictional prerequisites.

Further, statutory time limits and statutory exhaustion requirements generally serve very different purposes. Statutory time limits typically "protect defendants against stale or unduly delayed claims." In doing so, they advance "a defendant's case specific interest," not "broader system-related goal[s]." *John R. Sand*, 552 U.S. at 133. When a requirement advances a defendant's interests, it is reasonable to assume that Congress intended to place the onus on the defendant to assert that requirement as an affirmative defense. *Id.*

By contrast, exhaustion requirements typically vindicate multiple systemic goals, from allowing "courts [to] benefit" from an agency's "experience and expertise," *Salfi*, 422 U.S. at 765, to decreasing the "burden on the judicial system" by resolving claims before they reach the courts, *McNeil*, 508 U.S. at 112. Congress does not generally leave the vindication of these system-related goals to the discretion of a defendant; instead, it makes provisions that serve

these purposes "jurisdictional." *John R. Sand*, 552 U.S. at 134.

The equitable implications of designating a timing requirement jurisdictional are also very different from the implications of attaching the same designation to a statutory exhaustion requirement. This Court has often found that time limits are non-jurisdictional in part because of the inequities that would flow if those limits were strictly enforced. *See, e.g.*, *Wong*, 135 S. Ct. at 1631. When time limits are deemed jurisdictional, a litigant with a worthy claim will find herself barred from relief merely because she missed a statutory deadline, even where that error was the result of excusable procedural confusion or justifiable ignorance. *See id.* at 1629-30. But the same concerns are not in play with respect to an exhaustion requirement. If a suit is dismissed on jurisdictional grounds because a litigant failed to present her claim to the administrative body, the litigant may still be able to exhaust that claim and return to court if the statutory deadline has not passed or if she can present a good case for equitable tolling of that deadline. In light of these differing equitable consequences, it makes sense to presume that statutory time limits are intended to be flexible, while statutory exhaustion requirements are not.

The considerations that generally prompt this Court to treat timeliness and exhaustion requirements differently apply with full force with respect to Title VII. While the history indicates that Congress viewed the timeliness requirement as a flexible statute of limitations, *Zipes*, 455 U.S. at 393-394, it suggests that Congress viewed EEOC review as an indispensable component of the statutory scheme.

See supra pp. 28-31. And while Title VII's timeliness requirement is primarily intended to protect defendants from "stale" claims, *Zipes*, 455 U.S. at 394 (quoting 110 Cong. Rec. 7243 (1964) (statement of Sen. Case)), the exhaustion requirement serves numerous system-related purposes. *See supra* pp. 27-32.

Finally, precisely because Title VII's timeliness requirement is non-jurisdictional, deeming the exhaustion requirement jurisdictional will not create inequities. A litigant who mistakenly presents an unexhausted Title VII claim to the court will have that claim dismissed, but she will be able to present the claim to the EEOC and return to court once it is exhausted if the filing period has not run or if equity justifies tolling that period. Indeed, recognizing the jurisdictional nature of Title VII's exhaustion requirement will help plaintiffs in many cases because courts have a duty to analyze jurisdictional issues on their own initiative at the outset of a case. That duty increases the likelihood that an unexhausted Title VII claim will be dismissed promptly, before the EEOC filing period has expired.

II. EVEN UNDER A CLEAR-STATEMENT ANALYSIS, TITLE VII'S EXHAUSTION REQUIREMENT IS JURISDICTIONAL.

Because Title VII's text, structure, and purpose make it "fairly discernible" that Congress intended to strip courts of jurisdiction of claims that have not been presented to the EEOC, Title VII's exhaustion requirement is rightly deemed jurisdictional. Outside of the exhaustion context, however, this Court has sometimes applied a clear-statement rule to determine whether a statutory mandate qualifies as

a jurisdictional prerequisite. *E.g.*, *Sebelius*, 568 U.S. at 153. This Court has never applied that framework when assessing whether an "integrated scheme of administrative and judicial review" strips a court of jurisdiction over unexhausted claims. *Elgin*, 567 U.S. at 13 (quoting *Fausto*, 484 U.S. at 445). But even if the "clear statement" analysis applies, Title VII's exhaustion requirement is plainly jurisdictional.

In deciding whether Congress has made a "clear statement" that a statutory requirement is jurisdictional, this Court does not require Congress to "incant magic words." *Sebelius*, 568 U.S. at 153. Instead, the Court typically performs a holistic analysis that looks to the text and structure of the relevant statute, *see Reed Elsevier*, 559 U.S. at 168; the "goal[s]" the requirement serves, *John R. Sand*, 552 U.S. at 133; and the broader "context" of this Court's precedent, *Sebelius*, 568 U.S. at 153-154 (quoting *Reed Elsevier*, 559 U.S. at 168). That contextual inquiry includes an examination of whether the Court has previously deemed the *particular* provision in question jurisdictional, *John R. Sand*, 552 U.S. at 134-136, and whether the Court's "interpretation of *similar* provisions in many years past" renders it "the type of limitation * * * that is properly ranked as jurisdictional absent an express designation," *Reed Elsevier*, 559 U.S. at 168 (emphasis added). Each of these considerations dictates that Title VII's exhaustion requirement is jurisdictional.

1. The "text and structure" of Title VII make plain Congress's intent to impose a jurisdictional bar on claims that have not been presented to the EEOC. Most critically, as explained above, the statute's

detailed, comprehensive, and integrated scheme for review leaves no room for courts to "allow [petitioners] to evade" the administrative processes. *Thunder Basin*, 510 U.S. at 216; *see supra* pp. 23-27. Title VII also includes several other textual and structural clues that reinforce the jurisdictional nature of the exhaustion requirement.

Section 2000e-5(f)(1) articulates Title VII's exhaustion requirement. Distilled to its essentials, that section provides:

> If a charge filed with the Commission * * * is dismissed * * * or if within one hundred and eighty days from the filing of such charge * * * the Commission has not filed a civil action * * * a civil action may be brought against the respondent named in the charge * * * by the person claiming to be aggrieved * * * .

42 U.S.C. § 2000e-5(f)(1). This language is "similar to other" exhaustion requirements "that this Court has deemed jurisdictional." *Patchak* v. *Zinke*, 138 S. Ct. 897, 905 (2018) (plurality opinion). For example, in *Mathews*, the exhaustion requirement that the Court found jurisdictional stated that "'[a]ny individual, after any final decision of the Secretary made after a hearing to which he was a party * * * may obtain a review of such decision by a civil action.'" 424 U.S. at 328.

Moreover, Section 2000e-5(f)(1) is "house[d]" in the same section as the statute's "jurisdictional grant," and is "link[ed]" to the provision vesting jurisdiction in federal courts. *Wong*, 135 S. Ct. at 1633; *see also Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 439 (2011) (holding a statutory requirement non-jurisdictional in part because it did not appear

in the provision captioned "Jurisdiction; finality of decisions"). Title VII's exhaustion requirement appears in Section 2000e-5(f), a section that the *Zipes* Court described—in its entirety—as "[t]he provision granting district courts jurisdiction under Title VII." 455 U.S. at 393. That is likely because all three components of Section 2000e-5(f) work together to establish jurisdiction over Title VII claims: Section 2000e-5(f)(1) sets out the circumstances in which the Commission or the Attorney General "*may bring* a civil action," and the conditions under which a "civil *action may be brought* against the respondent named in the charge" by "the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(f)(1) (emphases added). Section 2000e-5(f)(2), in turn, specifies that the Commission or the Attorney General "*may bring* an action for appropriate temporary or preliminary relief pending final disposition of such charge." *Id.* § 2000e-5(f)(2) (emphasis added). And Section 2000e-5(f)(3) dictates that courts "shall have jurisdiction of *actions brought* under this subchapter." *Id.* § 2000e-5(f)(3) (emphasis added). Read as a whole, Section 2000e-5(f) thus grants courts "jurisdiction" only over those actions that are "brought" following an EEOC "charge."

The provisions of Section 2000e-5 that spell out the particular remedial powers of the courts with respect to Title VII claims reinforce this conclusion. Those provisions rely on the premise that a charge has been filed with the agency. Echoing the statutory language governing administrative review, Section 2000e-5(g) empowers a court to "enjoin the respondent" (not the "defendant") and to award back pay "from a date [no] more than two years prior to the filing of a charge with the Commission." *Id.* § 2000e-

5(g)(1). As a consequence, a court cannot award these forms of relief without "work[ing] a kind of linguistic havoc" on the statute. *United States* v. *Brockamp*, 519 U.S. 347, 352 (1997). Indeed, all of the provisions governing judicial review repeatedly refer to the "charge" and the "respondent," demonstrating that Congress did not envision any judicial review where there was merely a "complaint" and a "defendant." *See* 42 U.S.C. § 2000e(5)(f)(1), (f)(2), (g)(1).

The absence of any statutory exceptions to the exhaustion requirement reinforces that conclusion. The text does not provide for judicial review of any employment discrimination claim that has not passed through the administrative scheme. In *Reed Elsevier*, this Court held that the "most significant[ ]" reason registration with the Copyright Office cannot be understood as a jurisdictional prerequisite to an infringement claim is that the statute "expressly *allows* courts to adjudicate infringement claims involving unregistered works in three circumstances." 559 U.S. at 165 (emphasis in original). Where Congress itself has permitted exceptions, it strongly suggests that courts may allow additional equitable exceptions such as waiver. *Id.* But the reverse is also true: Where Congress creates a scheme—particularly an administrative review scheme—that brooks no exceptions, it is unlikely that Congress intended to permit courts to excuse compliance with the statutory requirement for any reason. *See Patchak*, 138 S. Ct. at 906 (plurality opinion) (when Congress "completely prohibits" hearing actions of a particular type, the restriction tends to be jurisdictional).

Permitting jurisdiction over claims that have not been presented to the agency would also create a structural anomaly with respect to the scope of the EEOC's power. This Court has held that "the existence of a charge that meets the requirements set forth in [42 U.S.C. § 2000e-5(b)] is a jurisdictional prerequisite to judicial enforcement of a subpoena issued by the EEOC." *Shell Oil*, 466 U.S. at 65. Because Congress has withheld jurisdiction from courts to enforce the Commission's *investigative* activities in the absence of a charge, it would be illogical to conclude that Congress intended to afford *full judicial relief* to private parties in the same circumstance. That is particularly so because Congress intended the EEOC "to bear the primary burden of litigation," *Waffle House*, 534 U.S. at 286 (quoting *Gen. Tel. Co.*, 446 U.S. at 326), and mandated that an EEOC investigation must *precede* the filing of a private Title VII complaint, *see* 42 U.S.C. § 2000e-5(b), (f)(1).

2. The purpose of the Title VII exhaustion requirement also makes clear that it is jurisdictional. This Court has explained that jurisdictional requirements typically "seek not so much to protect a defendant's case-specific interest[s] * * * as to achieve broader system-related goal[s], such as facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency." *John R. Sand*, 552 U.S. at 133 (citations omitted). Title VII's exhaustion requirement advances *all three* of those system-related goals.

First, requiring employees to present their claims to the EEOC plainly "facilitat[es] the administration

of claims," *id.*, by giving the Commission and state agencies the opportunity to investigate claims, assemble a factual record, and bring their expertise to bear on employment disputes. *See Gen. Tel. Co.*, 446 U.S. at 326; *Waffle House*, 534 U.S. at 286-288.

Second, the exhaustion requirement "limit[s] the scope of a governmental waiver of sovereign immunity." *John R. Sand*, 552 U.S. at 133. Section 2000e-5(f) serves this goal directly by ensuring that state sovereign immunity is abrogated for a claim brought against a state employer only if the State has had an opportunity to resolve the claim outside of court first. *See Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 729-730 (2003) (recognizing that Title VII abrogates state sovereign immunity); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 243 (1985) (abrogation of state sovereign immunity must be expressed "in unmistakable language"). And Section 2000e-5(f) also indirectly prevents the Federal Government from enduring a waiver of its sovereign immunity that is broader than Congress intended: Section 2000e-16 governs Title VII claims against the Federal Government, and it explicitly incorporates the exhaustion requirement of Section 2000e-5(f). *See* 42 U.S.C. § 2000e-16(d).[7]

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[7] In *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court suggested that the timeliness requirement in Section 2000e-5 and the timeliness requirement in Section 2000e-16 should both be deemed non-jurisdictional because permitting "equitable tolling" would "amount[] to little, if any, broadening of the congressional waiver" of sovereign immunity. 498 U.S. at 95. The opposite is true for the exhaustion requirement: Whereas permitting equitable tolling merely affects the timing of a suit, requiring a plaintiff to follow the administrative

Third, Title VII's exhaustion requirement "promot[es] judicial efficiency," *John R. Sand*, 552 U.S. at 133, by facilitating the voluntary resolution of claims, mandating efforts at informal conciliation, and—if a suit is necessary—giving the expert agency an opportunity to take the lead in bringing any litigation. *See* 42 U.S.C. § 2000e-5(b), (f)(1); *Mach Mining*, 135 S. Ct. at 1651 (explaining that the agency's "duty * * * to attempt conciliation of a discrimination charge prior to filing a lawsuit" is "a key component of the statutory scheme"); *see also McNeil*, 508 U.S. at 112 (explaining that requiring a claimant to present an issue to an agency decreases the "burden on the judicial system," particularly where the scheme "govern[s] the processing of a vast multitude of claims").

In light of the fact that Title VII advances these system-related goals, Congress would hardly have intended for courts to characterize Title VII's exhaustion requirement as non-jurisdictional. That would enable a private defendant to vitiate these systemic protections by failing, whether by design or by accident, to enforce the exhaustion requirement.

3. The context provided by this Court's precedents—both as to Title VII in particular and as to exhaustion requirements more generally—reinforces the conclusion that Title VII's exhaustion requirement is jurisdictional.

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process may eliminate the need for litigation against the sovereign altogether. *Irwin* therefore suggests that the exhaustion requirement should be treated as jurisdictional to avoid significantly broadening the congressional waiver of sovereign immunity.

As to Title VII in particular: Shortly after the statute's enactment, this Court twice held that the filing of "charges of employment discrimination with the Commission" is one of "the jurisdictional prerequisites to a federal action." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973); *see Alexander*, 415 U.S. at 47 (same). In the years since, the Court has refined those blunt statements: In *Zipes*, the Court clarified that the Act's "*timely* filing" requirement is not jurisdictional. 455 U.S. at 392-393 (emphasis added). And in two other cases, *Albemarle Paper* and *Franks*, the Court clarified that "backpay may be awarded on a class basis * * * without exhaustion of administrative procedures by the unnamed class members." *Albemarle Paper*, 422 U.S. at 414 n.8; *see also Franks*, 424 U.S. at 771.

Each of these later decisions was based on considerations that are irrelevant to the question of whether an individual plaintiff must present her claim to the EEOC. *Zipes*' reasoning was confined to the statute's timely filing requirement, *see supra* pp. 33-34, and the Court's statements in *Albemarle Paper* and *Franks* were limited to the unique setting of class actions. *See Albermale Paper*, 422 U.S. at 414 n.8; *Franks*, 424 U.S. at 771. In particular, the *Albemarle Paper* Court reasoned that requiring each member of a plaintiff class to individually exhaust her claims in order to receive backpay would effectively eliminate the availability of class relief in the Title VII context, a result the Court thought contrary to the broad terms of Title VII's back pay provision, 42 U.S.C. § 2000e-5(g), and to legislative history indicating that Congress had specifically rejected an attempt to limit class relief. 422 U.S. at 414 n.8; *see*

also Franks, 424 U.S. at 771 (relying on this reasoning in *Albemarle Paper*).

Importantly, neither *Zipes* nor *Albemarle Paper* nor *Franks* ever suggested that a court may exercise jurisdiction over a claim that *no* party has presented in a charge to the EEOC. And the Court's precedent since then has confirmed the jurisdictional nature of the exhaustion requirement: In *Waffle House*, the Court explained that Title VII grants the EEOC "*exclusive* jurisdiction over [a] claim for 180 days," 534 U.S. at 288 (emphasis added). That statement would be false if courts have jurisdiction to hear Title VII clams whenever they are brought.

Most recently, in *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500 (2006), the Court held that Title VII's employee numerosity requirement is not jurisdictional. But the analysis that led the Court to that conclusion points in the opposite direction with respect to the exhaustion requirement. Notably, the Court held that the numerosity requirement was non-jurisdictional because (1) "[n]othing in the text of Title VII indicates that Congress" wants courts to be able to raise numerosity "on their own motion"; (2) numerosity is properly regarded as an "element" of the claim that should be left to a jury to decide; and (3) it would be inequitable to force courts to dismiss claims that do not meet the numerosity requirement. *Id.* at 514. But with respect to the exhaustion requirement, (1) the entire framework of Title VII indicates that Congress intended courts to raise exhaustion "on their own motion," *see supra* pp. 41-45; (2) exhaustion is in no way an element of the claim; and (3) because Title VII's time limits are subject to equitable tolling, a jurisdictional dismissal

does not have the severe equitable consequences it did in *Arbaugh*, *see supra* pp. 39-40.

Moreover, the *Arbaugh* Court recognized that even when all three of these considerations counsel in favor of finding one of Title VII's requirements non-jurisdictional, that requirement may still be deemed jurisdictional if the statute contains evidence that Congress intended to make it "an ingredient of subject matter jurisdiction." 546 U.S. at 514. The Court found no such evidence in *Arbaugh* in large part because the numerosity requirement is located "in a separate provision" from Title VII's jurisdictional grant, and because the numerosity requirement "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 515 (quoting *Zipes*, 455 U.S. at 394). Once more, the opposite is true for Title VII's exhaustion requirement. That requirement is in the same section as the jurisdictional grant and is textually linked to it. *See supra* pp. 42-43.

The import of this precedent concerning Title VII in particular is amplified by the Court's precedent regarding the jurisdictional nature of exhaustion requirements in general. In *Reed Elsevier*, the Court held that a requirement will be deemed jurisdictional where the "Court's interpretation of similar provisions" shows that the requirement is of a "type * * * that is properly ranked as jurisdictional absent an express designation." 559 U.S. at 168. The *Reed Elsevier* Court further explained that in *Bowles* v. *Russell*, 551 U.S. 205 (2007), the Court had deemed an appellate filing deadline jurisdictional because it "was of a type [the Court] had long held *did* speak in jurisdictional terms even absent a jurisdictional

label" and because "nothing about [the provision's] text or context, or the historical treatment of that type of limitation, justified a departure from this view." 559 U.S. at 168 (internal quotation marks omitted).

The same is true with respect to Title VII's exhaustion provision. As the numerous cases cited in Part I demonstrate, this Court has long treated exhaustion provisions "as jurisdictional absent an express designation." *Id.* For example, none of the provisions of the CSRA that created the "jurisdictional rule" in *Elgin* were expressly styled as jurisdictional prerequisites. *See* 5 U.S.C. §§ 7701, 7703, 7513. Likewise, the *Thunder Basin* Court recognized that it had to decide whether the administrative procedures at stake in that case were the exclusive route to federal court jurisdiction because the Mine Act was "facially silent" as to whether pre-enforcement challenges were within the jurisdiction of federal district courts. 510 U.S. at 208.

The Court has also repeatedly held that statutory mandates are jurisdictional where they require a litigant to present an issue to the agency in the first instance, even when the mandate is not expressed in jurisdictional terms. *See, e.g.*, *McNeil*, 508 U.S. at 111 (affirming jurisdictional dismissal where the FTCA prohibited a claimant from "institut[ing]" a suit before he had "first presented the claim to the appropriate Federal agency" (internal quotation marks omitted)). Most notably, in *Woelke*, the Court held that courts lack jurisdiction to review objections that have not been pressed before the NLRB, even though the statute states only that "no objection that has not been urged before the Board * * * shall be

considered" by a court, and even though the provision contains an explicit exception for "extraordinary circumstances." 456 U.S. at 665; *see Reed Elsevier*, 559 U.S. at 165 (observing that the presence of exceptions tends to suggest a requirement is non-jurisdictional).

The paucity of cases deeming *statutory* exhaustion requirements non-jurisdictional is similarly telling. Of course, judicially imposed exhaustion requirements are never jurisdictional, which sometimes creates the impression that exhaustion requirements in general must be similarly flexible. In fact, the reverse is true: While "judge-made exhaustion doctrines, even if flatly stated at first, remain amenable to judge-made exceptions[,] * * * statutory exhaustion provision[s] stand[] on a different footing." *Ross*, 136 S. Ct. at 1857 (citation omitted).

Thus, when the *Reed Elsevier* Court cited examples of non-jurisdictional statutory exhaustion requirements, it identified only two cases, both of which concerned the Prison Litigation Reform Act. *See* 559 U.S. at 166 n.6. That Act, however, provides a rare example of a statute in which Congress has expressly disclaimed the jurisdictional nature of the exhaustion requirement by specifying that non-jurisdictional defenses may be decided before exhaustion. *See Woodford*, 548 U.S. at 101 (citing 42 U.S.C. § 1997e(c)(2)). And even as to that statute, the Court has repeatedly held that the PLRA's exhaustion requirement is sufficiently absolute that it "foreclose[es] judicial discretion" to recognize exceptions. *Ross*, 136 S. Ct. at 1857.

In the absence of an explicit statutory indication like that found in the PLRA, the Court has consist-

ently refused to treat statutory exhaustion requirements as non-jurisdictional. Indeed, in *Hallstrom* v. *Tillamook Cty.*, 493 U.S. 20 (1989), the Court confronted a statutory provision that required a litigant to give a federal agency, a State, and an alleged violator 60 days' notice before filing suit regarding certain environmental violations. The statute did not set out any detailed administrative process in connection with the notice requirement, and it contained an express exception permitting litigants to forgo notice with respect to suits raising certain violations. *See* 42 U.S.C. § 6972(b). Nonetheless, the *Hallstrom* Court declined to hold that the requirement was non-jurisdictional or that the notice requirement could be satisfied after the suit had been filed. 493 U.S. at 32-33. Instead, the Court held that the notice requirement was, at a minimum, a "mandatory condition[ ] precedent to * * * suit," *id.* at 31, which was not subject to "equitable modification," *id.* at 27. It therefore held that failure to comply with the notice provision "require[d] dismissal of [an] action" even "after years of litigation and a determination on the merits." *Id.* at 32; *see Reed Elsevier*, 559 U.S. at 171 (characterizing the provision at stake in *Hallstrom* as a "mandatory precondition to suit that * * * district courts may or should enforce *sua sponte*").

Hallstrom reveals this Court's extreme reticence to permit courts to excuse litigants from complying with statutory provisions mandating that a claim be brought before a federal agency in the first instance. Title VII's exhaustion requirement is much more robust than that in *Hallstrom*, and it is directly analogous to the numerous statutory exhaustion requirements this Court has found jurisdictional in

the past. For these reasons, and because the text, structure, and precedent all point in the same direction, there can be no real doubt that Title VII "clearly states" a congressional intent to make exhaustion a jurisdictional prerequisite to suit.

III. THE DISTRICT COURT PROPERLY DISMISSED RESPONDENT'S RELIGIOUS DISCRIMINATION CLAIM FOR LACK OF JURISDICTION.

Because Title VII's exhaustion requirement is jurisdictional under any standard, Davis's unexhausted religious discrimination claim must be dismissed. Title VII requires that a charge of discrimination be "in writing under oath or affirmation," "contain such information and be in such form as the Commission requires," and provide sufficient detail to allow the Commission both to notify the employer of the "date, place and circumstances of the alleged unlawful employment practice" and to "make an investigation." 42 U.S.C. § 2000e-5(b).

The charge Davis filed with the Texas Workforce Commission and the EEOC fulfilled each of these requirements with respect to her allegations of sexual harassment and retaliation. Using the TWC's charge form, Davis submitted a notarized charge presenting these two claims to the TWC and the EEOC. J.A. 80. "Retaliation" and "sex" are marked as the bases for the discrimination in the appropriate section of the charge. *Id.* The charge also describes several specific instances of sexual harassment and retaliation, including the dates and locations of those incidents. And, in the "Discrimination Statement," the charge asserts that respondent was "discriminated against *** because of [her] gender/sex, female,

and in retaliation for [her] complaint of harassment." *Id.*

The TWC sent Davis a letter through her attorney specifically acknowledging that it had investigated her allegations of "Sex" discrimination and "Retaliation." J.A. 92-95. Both the TWC and the Department of Justice sent Davis "Right to Sue" letters referencing the charge. J.A. 97-98, 105-106. Accordingly, the district court had jurisdiction over Davis's sexual harassment and retaliation claims.

The opposite is true with respect to the religious discrimination claim that Davis raised for the first time in her complaint before the district court. *See* Pet. App. 29a-35a. That claim was not asserted in Davis's charge. The charge form provides a box to indicate that "religion" is a basis for the asserted discrimination. That box is unchecked. J.A. 80. The charge does not describe the "date, place and circumstances" of any alleged religious discrimination, 42 U.S.C. § 2000e-5(b), and there is no allegation of religious discrimination in the charge's "Discrimination Statement." J.A. 80. The TWC's letter describing its investigation similarly makes no mention of any alleged religious discrimination. J.A. 92-95.

Indeed, the only recorded reference to religious discrimination before Davis raised the allegation in her district court complaint comes in an edit that Davis made to her EEOC "intake questionnaire." That edit involved handwriting the word "religion" onto the second page of the form without any additional details. *See* J.A. 71, 90. Because that single word could not possibly give the EEOC sufficient information to "make an investigation" of the alleged religious discrimination or to "notify" Fort

Bend County of the "date, place, and circumstances of the alleged unlawful employment practice," 42 U.S.C. § 2000e-5(b), the edit would have been insufficient even if it had appeared on Davis's notarized charge form. And it did not.

Permitting the courts to assume jurisdiction over this religious discrimination claim would therefore run roughshod over Congress's carefully constructed scheme of administrative and judicial review. Because Davis did not present her claim to the EEOC, it could not "make an investigation" of the alleged religious discrimination or attempt to resolve it "by informal methods of conference, conciliation, and persuasion." *Id.* And because the EEOC was not informed of Davis's allegation of religious discrimination, the EEOC received no notice that it should monitor future complaints against Fort Bend County to ensure that the County is not engaged in a "pattern or practice" of religious discrimination. Finally, because Davis brought this claim directly to the court, the sovereign County lost an important opportunity to address the allegation before becoming embroiled in costly litigation. This is not the scheme Congress envisioned.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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ADDENDUM

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STATUTORY PROVISIONS INVOLVED

1. **Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, provides in pertinent part:**

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * *

2. **Section 706 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, provides:**

Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency,

labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon

which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has

initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall

take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission,

or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to

such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court--

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of Title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of Title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

3. **Section 707 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6, provides:**

Civil actions by the Attorney General

(a) Complaint

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) Jurisdiction; three-judge district court for cases of general public importance: hearing,

determination, expedition of action, review by Supreme Court; single judge district court: hearing, determination, expedition of action

The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending

immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Transfer of functions, etc., to Commission; effective date; prerequisite to transfer; execution of functions by Commission

Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of Title 5, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Transfer of functions, etc., not to affect suits commenced pursuant to this section prior to date of transfer

Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Investigation and action by Commission pursuant to filing of charge of discrimination; procedure

Subsequent to March 24, 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title.

4. **Section 709 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8, provides:**

Investigations

(a) Examination and copying of evidence related to unlawful employment practices

In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of

any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

(b) Cooperation with State and local agencies administering State fair employment practices laws; participation in and contribution to research and other projects; utilization of services; payment in advance or reimbursement; agreements and rescission of agreements

The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines

that the agreement no longer serves the interest of effective enforcement of this subchapter.

(c) Execution, retention, and preservation of records; reports to Commission; training program records; appropriate relief from regulation or order for undue hardship; procedure for exemption; judicial action to compel compliance

Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order

issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

(d) Consultation and coordination between Commission and interested State and Federal agencies in prescribing recordkeeping and reporting requirements; availability of information furnished pursuant to recordkeeping and reporting requirements; conditions on availability

In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any

State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) Prohibited disclosures; penalties

It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

5. **Section 710 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-9, provides:**

Conduct of hearings and investigations pursuant to section 161 of Title 29

For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of Title 29 shall apply.

6. **Section 717 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, provides:**

Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Publishing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and

regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall--

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be

notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to--

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a), or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any

succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

(f) Section 2000e-5(e)(3) of this title applicable to compensation discrimination

Section 2000e-5(e)(3) of this title shall apply to complaints of discrimination in compensation under this section.

No. 18-525

IN THE

Supreme Court of the United States

FORT BEND COUNTY,

Petitioner,

v.

LOIS M. DAVIS,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether Title VII's administrative exhaustion requirement is subject to waiver and forfeiture.

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BRIEF FOR RESPONDENT

Respondent Lois Davis respectfully requests that this Court affirm the judgment of the court of appeals.

INTRODUCTION

Everyone agrees that Title VII requires employees like Ms. Davis to submit a charge to the Equal Employment Opportunity Commission (EEOC) before filing suit in court. Everyone also agrees that this exhaustion requirement is an important part of Title VII's remedial scheme. And everyone agrees that a court must enforce the requirement when a defendant timely raises it. The only question in this case is what happens when a defendant like petitioner fails to raise the issue of exhaustion until years into the litigation.

This Court's approach to questions of that sort is now well-settled. The Court has emphasized that a statutory requirement is subject to ordinary principles of waiver and forfeiture unless it limits the subject-matter jurisdiction of the courts. The Court has repeatedly instructed that a requirement may be deemed jurisdictional only if Congress "clearly states" that it is. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006). And time and again, the Court has held that statutory requirements are subject to waiver and forfeiture where, as here, they "do[] not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 515 (citation omitted).

Seeking to escape that straightforward conclusion, petitioner offers up a theory that it neither raised below nor previewed in its petition for certiorari. Petitioner now asserts that there is a special exception to the clear-statement rule for exhaustion requirements. Petitioner insists that those requirements are

jurisdictional whenever it is "fairly discernible" that Congress intended them to be—and that the requisite intent is "fairly discernible" from virtually any "statutory scheme of administrative and judicial review" that requires parties to present their claims to an expert agency before going to court. Petr. Br. 20 (quoting *Elgin v. Dep't of Treasury*, 567 U.S. 1, 8-10 (2012)).

Petitioner does not cite—and we have not found—any decision endorsing (or even entertaining) that new theory. That is no surprise, because the decisions on which petitioner relies have nothing to do with the question presented here. The "fairly discernible" standard set forth in *Elgin* determines whether a statutory scheme granting courts of appeals exclusive jurisdiction to review the decisions of an administrative agency strips district courts of jurisdiction over related claims by displacing "the general grant of federal-question jurisdiction in 28 U.S.C. § 1331." 567 U.S. at 9. It decides *which court* has jurisdiction, not *which requirements* are jurisdictional.

The latter question is the only one at issue here. And as to that question, this Court has explained that "threshold requirements that claimants must complete, or exhaust, before filing a lawsuit" are governed by the established clear-statement rule and are ordinarily "nonjurisdictional." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010). Title VII's exhaustion requirement is no exception.

STATEMENT OF THE CASE

A. Legal background

Title VII prohibits employers from discriminating based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). It also prohibits retaliation

against employees who assert their rights under the statute. *Id.* § 2000e-3(a). To enforce those prohibitions, Congress gave employees the right to bring suit after satisfying administrative preconditions aimed at securing voluntary compliance.

1. An employee who seeks to recover for a violation of Title VII must file a charge with the EEOC within 180 days of the violation. 42 U.S.C. § 2000e-5(e)(1). If a state agency has authority to enforce a parallel state law, that deadline is extended to 300 days and the state agency must be given 60 days to address the matter before a charge is filed with the Commission. *Id.* § 2000e-5(c), (e)(1); 29 C.F.R. § 1601.13.

A written submission need not satisfy formal requirements to be a charge. Instead, it is sufficient if it identifies the employer, generally describes the alleged unlawful practice, and is "reasonably construed as a request for the agency to take remedial action." *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 402 (2008) (addressing parallel provisions of the Age Discrimination in Employment Act (ADEA)); *see* 29 C.F.R. § 1601.12(b). The employee may "clarify and amplify" her allegations after the charge is filed, and may allege additional violations "related to or growing out of the subject matter of the original charge." 29 C.F.R. § 1601.12(b). Those flexible, informal procedures reflect a "remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." *Holowecki*, 552 U.S. at 402 (citation omitted).

When the EEOC receives a charge, it notifies the employer and conducts an investigation. 42 U.S.C. § 2000e-5(b). If the Commission finds "reasonable cause" to believe that the employer violated Title VII, it must try to redress the violation through "informal

methods of conference, conciliation, and persuasion." *Id.* The EEOC has no "direct powers of enforcement"—it cannot "adjudicate claims or impose administrative sanctions." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Instead, if the Commission cannot secure a conciliation agreement, either the Commission or the Department of Justice may bring an enforcement action in court. 42 U.S.C. § 2000e-5(f)(1).

2. "Title VII also makes private lawsuits by aggrieved employees an important part of its means of enforcement." *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 595 (1981). If the EEOC finds no reasonable cause, it must issue the employee a right-to-sue letter. 42 U.S.C. § 2000e-5(b), (f)(1). And if, as is common, the EEOC has not resolved a charge within 180 days, an employee who is "dissatisfied with the progress the EEOC is making" may terminate the administrative process and request a right-to-sue letter at any time. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 361 (1977); *see* 29 C.F.R. § 1601.28(a).

Title VII provides that "within ninety days" after the issuance of a right-to-sue letter, "a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(f)(1). Employees who file suit have "the right to *de novo* consideration of their Title VII claims," with no deference to any findings by the EEOC. *Chandler v. Roudebush*, 425 U.S. 840, 844 (1976).

Title VII's reliance on private suits reflects Congress's recognition that the EEOC lacks the resources to fully and promptly investigate the enormous volume of charges it receives, or to bring suits to remedy all of the violations it finds. *See Occidental*, 432 U.S. at 361-66. In 2017, for example,

the Commission received nearly 60,000 Title VII charges but concluded just 719 successful conciliations and brought only 107 enforcement suits.[1]

B. Factual background

1. Ms. Davis is a "devout Christian." J.A. 44. An active member of her church, she has long attended 8:00 AM and 10:00 AM services every Sunday. *Id.* She also attends Tuesday-night Bible studies and plays "an important role" in the church's administration. *Id.* "All of those actions are directly motivated and required by Ms. Davis's personal religious faith." *Id.*

In December 2007, petitioner hired Ms. Davis as a supervisor in its IT Department. J.A. 40. She was responsible for managing fifteen employees. *Id.* As the sole provider for her son, she was committed to "doing the best job possible" in order to "get [him] graduated from high school, and off to college." *Id.* 75.

Soon after Ms. Davis started her job, the Director of the IT Department, Charles Cook, began subjecting her to "constant sexual harassment and assaults." Pet. App. 17a n.2; *see* J.A. 40-41. Ms. Davis complained to petitioner's Human Resources office, which ultimately substantiated her allegations. Pet. App. 17a n.2. Mr. Cook resigned. *Id.*

Ms. Davis's supervisor, Kenneth Ford, was a close friend of Mr. Cook's. Pet. App. 17a n.2. After Mr. Cook resigned, Mr. Ford reduced Ms. Davis's "direct reports from fifteen to four," "removed [her] from projects she had previously managed," "superseded her authority"

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[1] EEOC, *Title VII of the Civil Rights Act of 1964 Charges FY1997 - FY2017*, http://tinyurl.com/y5gnjfhz; EEOC, *Litigation Statistics, FY1997 through FY2017*, http://tinyurl.com/y28ou6oj.

with her subordinates, and "removed her administrative rights" to the server. *Id.* In response, Ms. Davis filed a charge with the Texas Workforce Commission (TWC), which investigates Title VII claims under a work-sharing agreement with the EEOC. *Id.* 2a. The charge alleged retaliation and sex discrimination. *Id.*

2. In March 2011, while the charge was pending, petitioner assigned Ms. Davis to help install computer equipment in a new facility. Pet. App. 18a n.2. Ms. Davis worked tirelessly on the project that spring, logging sixty or more hours a week. J.A. 44-45. In June, Mr. Ford told Ms. Davis and others that they would have to be available to work on the installation over the holiday weekend of July 2-4. *Id.* 45. Ms. Davis advised him that she needed to attend a "special church service" for a few hours that Sunday, and she arranged for another employee to fulfill her responsibilities during that time. Pet. App. 18a n.2. She also made clear that she was "more than willing" to resume work as soon as the service ended. *Id.*

Mr. Ford refused to accommodate Ms. Davis's religious observance. Instead, he told her that attending her church service would be "grounds for a write-up or termination." Pet. App. 18a n.2. And when Ms. Davis nevertheless fulfilled her religious obligations, she was "immediately terminated." *Id.* 19a. Yet no similar fate befell a coworker who took time off that weekend to attend a secular parade. *Id.*

3. After her firing, Ms. Davis amended her TWC intake form to include "Religion" as one of the "Employment Harms" she suffered. J.A. 90; *see* Pet. App. 2a, 20a. She also added two new complaints to that section of the form: "Discharge" and "Reasonable Accommodation." J.A. 90.

A few months later, the TWC issued a letter advising Ms. Davis that, barring new developments, it would dismiss her charge because it had not found sufficient evidence that petitioner had discriminated against her "based on Sex, Retaliation, or any other reason prohibited by the laws [the TWC] enforce[s]." J.A. 92. Shortly thereafter, the TWC and the federal government issued Ms. Davis right-to-sue letters. *Id.* 97-98, 105-06.

C. The proceedings below

1. Ms. Davis filed a Title VII suit alleging religious discrimination, sex discrimination, and retaliation. The district court initially granted summary judgment to petitioner, but the Fifth Circuit reversed and remanded for further proceedings on Ms. Davis's religious-discrimination claim. 765 F.3d 480 (2014). The Fifth Circuit held that the district court had impermissibly second-guessed Ms. Davis's religious beliefs by concluding that the church service was a mere "personal commitment." *Id.* at 486. Instead, the Fifth Circuit determined that Ms. Davis had offered sufficient evidence that she missed work because of a sincere "religious need." *Id.* at 487. It further held that there was at least a genuine issue of material fact about whether petitioner "would have suffered undue hardship in accommodating [her] religious observance." *Id.* at 489. This Court denied petitioner's request for certiorari. 135 S. Ct. 2804 (2015).

2. It was only after the case returned to the district court—five years into the litigation—that petitioner first asserted that Ms. Davis had not adequately raised her religious-discrimination claim during administrative proceedings. Pet. App. 3a, 14a. Ms. Davis responded that petitioner had forfeited that

objection, and, in the alternative, that she had exhausted her claim. *Id.* 4a. The district court granted petitioner's motion to dismiss. *Id.* 17a-38a. It held that Ms. Davis's forfeiture argument was "irrelevant" because Title VII's exhaustion requirement is "jurisdictional." *Id.* 27a & n.7. It also concluded that Ms. Davis had not properly exhausted her claim. *Id.* 37a.

3. The Fifth Circuit reversed. Pet. App. 1a-15a. The court explained that a requirement limits the jurisdiction of the courts only if Congress "clearly states that [it] shall count as jurisdictional." *Id.* 10a (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006)). And the court held that "Congress did not suggest—much less clearly state—that Title VII's administrative exhaustion requirement is jurisdictional." *Id.* The court emphasized that the exhaustion requirement "is not expressed in jurisdictional terms" and that the statute "says nothing about a connection between the EEOC enforcement process and the power of a court to hear a Title VII case." *Id.* 10a-11a.

The Fifth Circuit emphasized that "[j]ust because Title VII's administrative exhaustion requirement is not jurisdictional does not mean that [it] should be ignored." Pet. App. 13a. Here, however, the court found it "abundantly clear" that petitioner had "forfeited" the issue by "wait[ing] five years and an entire round of appeals all the way to the Supreme Court before it argued that Davis failed to exhaust." *Id.* 14a-15a. The court therefore determined that it "need not address" Ms. Davis's argument that she had in fact exhausted her claim. *Id.* 15a n.5.

SUMMARY OF THE ARGUMENT

Title VII's exhaustion requirement is a non-jurisdictional claim-processing rule subject to normal principles of waiver and forfeiture.

I. In recent years, this Court has repeatedly instructed that a statutory requirement may be deemed jurisdictional only if Congress "clearly states" that it limits the jurisdiction of the courts. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006). That clear-statement rule resolves this case. In fact, Title VII's text and structure make clear that the exhaustion requirement is *not* jurisdictional.

Title VII specifies that within ninety days after the EEOC issues a right-to-sue letter, "a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(f)(1). All agree that this provision requires an employee to obtain a right-to-sue letter before bringing suit. But in imposing that requirement, Section 2000e-5(f)(1) neither refers to jurisdiction nor purports to limit the jurisdictional grants that authorize courts to hear Title VII claims. And in case after case, this Court has held that statutes are not jurisdictional where, as here, they "do[] not speak to a court's authority, but only to a party's procedural obligations." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 512 (2014).

Petitioner fails to muster anything resembling the showing this Court has demanded before deeming a statutory requirement jurisdictional. Petitioner does not seriously dispute the absence of jurisdictional language from Section 2000e-5(f)(1)'s text. Its attempt to derive an implied jurisdictional limit from

attenuated structural inferences only underscores the lack of a clear statement. And petitioner's remaining statutory arguments largely reduce to the observation that the EEOC process is an important part of Title VII's remedial scheme. But this Court has rejected the suggestion that a requirement "should be ranked as jurisdictional merely because it promotes important congressional objectives." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 169 n.9 (2010).

Like countless other important rules, Title VII's exhaustion requirement must be enforced when properly raised, but can be forfeited where, as here, "the party asserting the rule waits too long to raise the point." *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004). A nonjurisdictional requirement still gives employees every incentive to present their claims to the EEOC. But it avoids the unfairness, delay, and waste of judicial resources caused by the belated objections that would inevitably accompany a jurisdictional rule.

II. Attempting to escape the result that follows inexorably from this Court's clear-statement rule, petitioner resorts to a theory that it neither raised below nor included in the petition for certiorari. Petitioner now asserts that there is an exception to the clear-statement rule for exhaustion requirements. Petitioner maintains that those requirements are jurisdictional whenever it is "fairly discernible" that Congress intended them to be—and that such intent is fairly discernible almost any time Congress creates an integrated scheme of administrative and judicial review requiring "that an issue be presented to an expert agency in the first instance." Petr. Br. 20. In effect, petitioner proposes to stand the clear-statement rule on its head by presuming that exhaustion

requirements *are* jurisdictional unless Congress provides otherwise.

No court has endorsed that novel departure from the clear-statement rule, and for good reason. Petitioner's "fairly discernible" standard is plucked from decisions addressing an entirely different issue. Those decisions did not involve any question about whether a litigant's failure to comply with an exhaustion requirement deprived a court of jurisdiction that would otherwise exist. Instead, they asked whether statutory schemes granting courts of appeals exclusive jurisdiction to review certain administrative decisions stripped district courts of jurisdiction over related claims by withdrawing the general grant of federal-question jurisdiction. The "fairly discernible" standard is a means of deciding *which court* has jurisdiction over a claim—not *which requirements* are jurisdictional.

That latter question is the only one presented here, and it is governed by the clear-statement rule. Indeed, although petitioner does not acknowledge the relevant decisions, this Court has applied the rule to hold that other exhaustion requirements are not jurisdictional. *See, e.g.*, *Homer City*, 572 U.S. at 512. More broadly, the Court has recognized that "threshold requirements that claimants must complete, or exhaust, before filing a lawsuit" are classic examples of nonjurisdictional claim-processing rules. *Reed Elsevier*, 559 U.S. at 166. That perfectly describes Title VII's requirement that an employee file a charge and obtain a right-to-sue letter before bringing suit.

ARGUMENT

I. Title VII's exhaustion requirement is subject to waiver and forfeiture because Congress has not clearly stated that it is jurisdictional.

A litigant's failure to satisfy a procedural requirement deprives the courts of jurisdiction over her claim only if Congress "clearly states" that the requirement "shall count as jurisdictional." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006). Every court of appeals that has considered the question in light of that clear-statement rule has concluded, without dissent, that Title VII's exhaustion requirement is not jurisdictional.[2] As the Fifth Circuit recognized, the clear-statement rule makes this an easy case: "Congress did not suggest—much less clearly state—that Title VII's administrative exhaustion requirement is jurisdictional." Pet. App. 10a.

A. A statutory requirement is subject to waiver and forfeiture unless Congress clearly states that it is jurisdictional.

1. "Jurisdiction," this Court has often observed, "is a word of many, too many, meanings." *Arbaugh*, 546

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[2] *See, e.g.*, Pet. App. 9a-11a; *Adamov v. U.S. Bank Nat'l Ass'n*, 726 F.3d 851, 855-56 (6th Cir. 2013); *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1184-85 (10th Cir. 2018); *Artis v. Bernanke*, 630 F.3d 1031, 1034 (D.C. Cir. 2011) (joined by Kavanaugh, J.); *cf. Gad v. Kan. State Univ.*, 787 F.3d 1032, 1035-40 (10th Cir. 2015) (joined by Gorsuch, J.). Those circuits joined others that had reached the same result even before *Arbaugh*. *See, e.g.*, *McKinnon v. Kwong Wah Rest.*, 83 F.3d 498, 505 (1st Cir. 1996); *Boos v. Runyon*, 201 F.3d 178, 181-84 (2d Cir. 2000) (joined by Sotomayor, J.); *Anjelino v. N.Y. Times Co.*, 200 F.3d 73, 87 (3d Cir. 1999); *Gibson v. West*, 201 F.3d 990, 994 (7th Cir. 2000).

U.S. at 510 (citation omitted). Over the years, "[c]ourts—including this Court—have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010). Recently, however, the Court has sought "to bring some discipline to the use of this term." *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). It has emphasized that a rule should be labeled "jurisdictional" only if it "governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction." *Id.*

The "distinction between truly jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim-processing rules,' which do not," is critical. *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (citation omitted). "Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of the adversarial system." *Henderson*, 562 U.S. at 434. "[C]ourts are generally limited to addressing the claims and arguments advanced by the parties." *Id.* But because "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction," they must "raise and decide jurisdictional questions that the parties either overlook or elect not to press." *Id.*

Treating a requirement as jurisdictional can "waste . . . judicial resources" and "unfairly prejudice litigants." *Henderson*, 562 U.S. at 434. "For purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be raised at particular times." *Id.* But "subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *Arbaugh*, 546 U.S. at 514 (citation omitted). Jurisdictional objections "may be

raised at any time," even after trial or on appeal—and even if the objecting party "previously acknowledged the trial court's jurisdiction." *Henderson*, 562 U.S. at 434-35. When those tardy objections succeed, "many months of work on the part of the attorneys and the court may be wasted." *Id.* at 435.

2. This Court has refused to "lightly attach those 'drastic' consequences to limits Congress has enacted." *Gonzalez*, 565 U.S. at 141 (citation omitted). It has therefore adopted a straightforward "clear-statement principle." *Id.* at 142. Unless Congress "clearly states" that a requirement "shall count as jurisdictional," courts "should treat the restriction as nonjurisdictional." *Arbaugh*, 546 U.S. at 515-16. Because jurisdictional rules depart from the normal functioning of our adversarial system, that approach "capture[s] Congress' likely intent." *Henderson*, 562 U.S. at 436. And because it is a "readily administrable bright line," it ensures that "courts and litigants will be duly instructed and will not be left to wrestle" with disputes about the status of particular requirements. *Arbaugh*, 546 U.S. at 515-16.

Since *Arbaugh*, the Court has consistently applied the clear-statement rule to answer questions like the one presented here—and has held that statutory requirements of many different stripes are not jurisdictional because they lack the requisite clear statement. *See, e.g.*, *Musacchio v. United States*, 136 S. Ct. 709, 717-18 (2016); *United States v. Wong*, 135 S. Ct. 1625, 1632-33 (2015); *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 511-12 (2014); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153-55 (2013); *Gonzalez*, 565 U.S. at 141-45; *Stern v. Marshall*, 564 U.S. 462, 479-80 (2011); *Henderson*, 562 U.S. at 436-

42; *Reed Elsevier*, 559 U.S. at 161-66; *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs*, 558 U.S. 67, 81-83 (2009); *Arbaugh*, 546 U.S. at 515-16.

3. In holding that those requirements are not jurisdictional, this Court has emphasized that "calling a rule nonjurisdictional does not mean that it is not mandatory or that a timely objection can be ignored." *Gonzalez*, 565 U.S. at 146. Instead, it simply means that the rule can be waived or forfeited if "the party asserting the rule waits too long to raise the point." *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004).

B. Congress has not clearly stated that Title VII's exhaustion requirement is jurisdictional.

Title VII requires exhaustion, and a court must enforce that requirement if a defendant timely raises the issue. But an employee's failure to exhaust does not deprive the district court of jurisdiction because Congress has not clearly stated that the exhaustion requirement is jurisdictional. Quite the opposite: The statutory text and structure demonstrate that the exhaustion requirement is not jurisdictional, and this Court's decisions reinforce that conclusion.

1. Section 2000e-5(f)(1)'s text shows that the exhaustion requirement is not jurisdictional.

a. To determine whether Congress has clearly stated that a requirement is jurisdictional, "[w]e begin, as always, with the text." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017). Congress need not "incant magic words." *Wong*, 135 S. Ct. at 1632 (citation omitted). But "in case after case," this Court has "emphasized" that "jurisdictional statutes speak about jurisdiction, or more generally phrased, about a court's powers." *Id.* at 1633 n.4. The Court has

thus repeatedly held that statutes do not impose jurisdictional requirements when they "do[] not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Arbaugh*, 546 U.S. at 515 (citation omitted); *see, e.g.*, *Wong*, 135 S. Ct. at 1633 (same); *Gonzalez*, 565 U.S. at 143 (same); *Henderson*, 562 U.S. at 438 (same).

Congress knows how to impose a jurisdictional limit when it wishes to do so. It has "exercised its prerogative to restrict the subject-matter jurisdiction of federal district courts" in a variety of statutes. *Arbaugh*, 546 U.S. at 515 n.11. Those provisions clearly speak to the authority of the courts—by providing, for example, that "[n]o court shall have jurisdiction" over a claim unless specified requirements are met, *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 467-68 (2007) (quoting 31 U.S.C. § 3730(e)(4)(A) (2006)), or that parties "shall be immune from the jurisdiction of the courts of the United States" except under certain conditions, *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1318 (2017) (quoting 28 U.S.C. § 1604). *See Arbaugh*, 546 U.S. at 511 n.11 (collecting examples).

b. Congress emphatically declined to follow that model in Title VII. The provision at issue here specifies that "within ninety days" after the EEOC issues a right-to-sue letter, "a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(f)(1). That provision requires an employee to "obtain a right-to-sue letter before bringing suit." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1652 (2015). But in imposing that requirement, Section 2000e-5(f)(1)

neither uses the word "jurisdiction" nor otherwise refers to the courts' authority to hear Title VII cases.

Instead, Section 2000e-5(f)(1) simply specifies the circumstances under which an employee "may" file suit. The U.S. Code is replete with provisions using materially identical language to refer to conditions that plainly are not jurisdictional. Congress often provides, for example, that a suit "may" be brought when a statute has been violated—but no one could reasonably argue that those provisions require the plaintiff to prove a violation to establish jurisdiction.[3]

This Court has, moreover, applied the clear-statement rule to hold that various preconditions to suit—including preconditions framed in far more emphatic terms than this one—are not jurisdictional. For example:

- A statute directing that "[o]nly an objection . . . raised with reasonable specificity" during administrative proceedings "may be raised during judicial review" of a regulation. 42 U.S.C. § 7607(d)(7)(B); *see Homer City*, 572 U.S. at 511-12.
- A statute mandating that "no civil action for [copyright] infringement . . . shall be instituted until preregistration or registration of the copyright claim has been made" with the Copyright Office. 17 U.S.C. § 411(a); *see Reed Elsevier*, 559 U.S. at 160-66.

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[3] *See, e.g.*, 5 U.S.C. § 552a(g)(1)(D) (Privacy Act); 17 U.S.C. §§ 1009(a)-(b), 1203(a) (Copyright Act); 29 U.S.C. § 1132(a)(3), (4), (8) (Employee Retirement Income Security Act); 31 U.S.C. § 3730(b)(1) (False Claims Act); 35 U.S.C. § 292(b) (Patent Act).

- A statute specifying that "[a] tort claim against the United States shall be forever barred unless it is presented" to an agency "within two years" and filed in court "within six months" after the agency acts. 28 U.S.C. § 2401(b); *see Wong*, 135 S. Ct. at 1632-33.

Like those statutes, Section 2000e-5(f)(1) is not jurisdictional because "[i]t does not speak to a court's authority, but only to a party's procedural obligations." *Homer City*, 572 U.S. at 512.

c. Although petitioner devotes scant attention to the operative statutory text, it asserts that Section 2000e-5(f)(1) is "similar" to provisions that "this Court has deemed jurisdictional." Petr. Br. 42 (citation omitted). But the only provision petitioner cites actually undermines its position. Petitioner emphasizes that 42 U.S.C. § 405(g), the statute at issue in *Mathews v. Eldridge*, 424 U.S. 319 (1976), provides that a party "may" bring a civil action to obtain review of certain decisions related to Social Security benefits. But unlike Section 2000e-5(f)(1), Section 405(g) is expressly framed in jurisdictional terms. It provides that "[t]he court shall have power" to review the relevant decisions, and it is paired with an explicit withdrawal of other jurisdictional grants. *See* 42 U.S.C. § 405(h) ("No action . . . shall be brought under [S]ection 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter."). Accordingly, although *Mathews* predates this Court's articulation of the clear-statement rule, it further illustrates that jurisdictional statutes "speak in jurisdictional terms." *Arbaugh*, 546 U.S. at 515 (citation omitted).

2. Title VII's structure confirms that the exhaustion requirement is not jurisdictional.

The broader statutory structure confirms that Title VII's exhaustion requirement is a nonjurisdictional claim-processing rule subject to waiver and forfeiture.

a. As this Court explained in *Arbaugh*, district courts have jurisdiction over Title VII suits under both the general federal-question statute, 28 U.S.C. § 1331, and a specific provision directing that district courts "shall have jurisdiction of actions brought under [Title VII]," 42 U.S.C. § 2000e-5(f)(3). 546 U.S. at 505-06. State courts have concurrent jurisdiction because Title VII does not divest them of their "inherent authority" to decide claims arising under federal law. *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990) (citation omitted).

None of those sources of jurisdiction "conditions its jurisdictional grant," *Reed Elsevier*, 559 U.S. at 165, on whether the plaintiff properly exhausted her claim before the EEOC. The exhaustion requirement is located in Section 2000e-5(f)(1), "a provision 'separate' from those granting federal courts subject-matter jurisdiction." *Id.* at 164 (citation omitted). And nothing in that provision refers to or purports to limit the broad, unconditional grants of jurisdiction in Section 1331 and Section 2000e-5(f)(3)—or state courts' inherent authority to hear Title VII claims.

b. Petitioner maintains that various structural features of Title VII show that exhaustion is a jurisdictional requirement. Petr. Br. 41-45. They do not. And the lengths to which petitioner must go to try to establish the point only confirm that Congress did

not "clearly state[]" that the exhaustion requirement is jurisdictional. *Arbaugh*, 546 U.S. at 515.

First, petitioner asserts that Section 2000e-5(f)(1) is jurisdictional because Section 2000e-5(f) is "captioned 'jurisdiction.'" Petr. Br. 14; *see id.* 42-43. But that caption was not enacted by Congress; it was added to the U.S. Code by the Office of the Law Revision Counsel. *Cf.* Pub. L. No. 92-261, § 4, 86 Stat. 103, 105 (1972). And the sixty-three-word caption simply summarizes, in order, *all* of the various provisions in the five paragraphs of Section 2000e-5(f). The context makes clear that "jurisdiction" refers to the jurisdictional grant in Section 2000e-5(f)(3). The caption calls exhaustion a "precondition[]"—not a jurisdictional limit.

Second, petitioner observes that both the provision making exhaustion a precondition to suit and Section 2000e-5(f)(3)'s grant of jurisdiction are in Section 2000e-5(f). Petr. Br. 42-43. But "[m]ere proximity will not turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle." *Gonzalez*, 565 U.S. at 147; *accord Auburn*, 568 U.S. at 155. Here, as in *Gonzalez*, Congress "set off" the exhaustion requirement and the jurisdictional provision in "distinct paragraphs" and "excluded the jurisdictional terms in one from the other." 565 U.S. at 145.

Third, petitioner asserts that the exhaustion requirement is "linked" to Section 2000e-5(f)(3)'s jurisdictional grant because that provision confers jurisdiction over actions "brought under [Title VII]," and a claim is not properly "brought" under Title VII unless it is exhausted. Petr. Br. 42-43 (citation omitted). But this Court has held that even an explicit "cross-reference[]" to a jurisdictional provision does

not confer jurisdictional status on a separate statutory requirement. *Gonzalez*, 565 U.S. at 145. The "link[]" petitioner posits here is far more attenuated—and would give jurisdictional status to *all* of the requirements for properly bringing a Title VII action, including requirements this Court has held to be nonjurisdictional. *See* pp. 22-24, *infra*.

In any event, even if Section 2000e-5(f)(3)'s specific jurisdictional grant were somehow limited to properly exhausted claims, that would not yield the result petitioner seeks. The general grant of federal-question jurisdiction in 28 U.S.C. § 1331 is not so limited, because a Title VII claim still "aris[es] under" federal law even if it is not exhausted. And this Court has already held that Section 1331 independently confers jurisdiction over Title VII suits: Section 2000e-5(f)(3) does not add to or restrict Section 1331, but "serve[s] simply to underscore Congress' intention to provide a federal forum for Title VII claims." *Arbaugh*, 546 U.S. at 506.[4] The Court has likewise held that Section 2000e-5(f)(3) does not "oust[] state courts of their presumptive jurisdiction" to hear Title VII claims. *Yellow Freight Sys.*, 494 U.S. at 823.

Fourth, petitioner notes that various provisions governing Title VII suits "rely on the premise that a charge has been filed with the [EEOC]"—for example, by referring to the defendant as the "respondent" named in the charge. Petr. Br. 43-44. But those references simply reflect the fact that filing a charge is

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[4] Although Section 2000e-5(f)(3) no longer adds anything to Section 1331, it had independent effect before 1980, when Section 1331 included a $10,000 amount-in-controversy requirement. *Arbaugh*, 546 U.S. at 505-06.

a required precondition to suit—something we have never denied. They do not make that requirement jurisdictional.

Fifth, petitioner asserts that "[t]he absence of any statutory exceptions to the exhaustion requirement" shows that it is jurisdictional. Petr. Br. 44. But as petitioner later acknowledges (*id.* 48-49), Title VII *does* make an exception to the exhaustion requirement for unnamed members of a class action. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 770-71 (1976). In any event, petitioner exaggerates the significance of exceptions. This Court's decision in *Reed Elsevier* did not, as petitioner suggests, hold that exceptions were the "most significant" evidence that the copyright-registration requirement is nonjurisdictional. Petr. Br. 44 (brackets and citation omitted). It was simply the "most significant[]" of the "other factor[s]" the Court considered *after* analyzing the statutory text. 559 U.S. at 165. And the Court has often held that requirements are not jurisdictional even though they are "exception-free." *Wong*, 135 S. Ct. at 1632; *see, e.g.*, *Gonzalez*, 565 U.S. at 141-45; *Stern*, 564 U.S. at 479-80; *Arbaugh*, 546 U.S. at 515-16.

3. This Court's decisions reinforce the conclusion that the exhaustion requirement is not jurisdictional.

This Court's decisions addressing Title VII and related statutes further confirm what is apparent from the statutory text and structure: Title VII's exhaustion requirement can be waived or forfeited.

a. The Court has specifically addressed the jurisdictional status of two other provisions of Title

VII. It deemed both of them nonjurisdictional for reasons that apply equally here.

In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), the Court held that "filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit." *Id.* at 393. As petitioner notes, the specific holding in *Zipes* was that *timely* exhaustion is not a jurisdictional requirement. Petr. Br. 32-35. But the Court's textual and structural reasons for reaching that conclusion confirm that *no* aspect of the exhaustion requirement is jurisdictional. The Court emphasized that the time limit in Section 2000e-5(e)(1) "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts" and that it "appears as an entirely separate provision" from Title VII's jurisdictional grant. *Zipes*, 455 U.S. at 394. The same is true of the exhaustion requirement.

What's more, *Zipes* made the nonjurisdictional status of the exhaustion requirement an explicit premise of its decision. The Court explained that in amending Title VII in 1972, Congress ratified circuit-court decisions awarding relief "to class members who had not exhausted administrative remedies before the EEOC." 455 U.S. at 397. The Court concluded that in so doing, "Congress necessarily adopted the view that the provision for filing charges with the EEOC should not be construed to erect a jurisdictional prerequisite to suit." *Id.* That logic remains equally valid today, and provides still more reason to conclude that no part of the exhaustion requirement is jurisdictional.

The Court's other decision specifically addressing the status of a Title VII requirement was *Arbaugh* itself. There, the Court applied the clear-statement rule to hold that the provision limiting Title VII's

coverage to employers with more than fifteen employees is not jurisdictional. 546 U.S. at 515-16. As in *Zipes*, the Court emphasized that the employee-numerosity requirement is not found in the relevant jurisdictional grants but rather "appears in a separate provision that 'does not speak in jurisdictional terms.'" *Id.* at 515 (quoting *Zipes*, 455 U.S. at 394).

In seeking to distinguish *Arbaugh*, petitioner focuses on features of that case that had no bearing on the Court's application of the clear-statement rule. Petr. Br. 49-50. For example, petitioner notes that the fifteen-employee threshold is an "element" of a Title VII claim rather than a prerequisite to suit. *Id.* 49. But nothing in *Arbaugh* turned on that characterization—and this Court has since rejected any distinction between "an element of a Title VII claim" and "a prerequisite to initiating a lawsuit." *Reed Elsevier*, 559 U.S. at 165-66. Petitioner's remaining distinctions recycle its erroneous structural arguments—including its insistence that the exhaustion requirement is found in the same provision as Title VII's jurisdictional grant. Petr. Br. 50. That is not true, no matter how many times petitioner says it: "Title VII's jurisdictional provision" is "42 U.S.C. § 2000e-5(f)(3)"—not Section 2000e-5(f)(1). *Arbaugh*, 546 U.S. at 515.

b. In addition to *Zipes* and *Arbaugh*, this Court has issued two other decisions resting on the premise that preconditions closely resembling Title VII's exhaustion requirement are not jurisdictional.

In *Mach Mining*, the Court addressed the EEOC's obligation to attempt conciliation before bringing an enforcement action. 135 S. Ct. at 1651-53. Section 2000e-5(f)(1) makes compliance with that obligation a condition precedent to suit in language materially

identical to the language at issue here, specifying that the EEOC "may bring a civil action" if it "has been unable to secure . . . a conciliation agreement." The necessary implication of petitioner's position—which its amici make explicit, *see* Ctr. for Workplace Compliance Br. 7—is that conciliation is a jurisdictional precondition to an EEOC suit. But *Mach Mining* held that if the Commission fails to conciliate, "the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance" while "stay[ing]" the litigation. 135 S. Ct. at 1656. That remedy would be impermissible if the conciliation requirement were jurisdictional: It is axiomatic that when jurisdiction is lacking, "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (citation omitted).

Similarly, in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), the Court addressed the provision of the ADEA specifying that "no suit may be brought . . . before the expiration of sixty days" after the employee files a charge of discrimination with the relevant state agency. 29 U.S.C. § 633(b). Again, petitioner's position necessarily implies that this exhaustion requirement is jurisdictional. But again, this Court held that the remedy when an employee fails to comply is to "hold [the] suit in abeyance" until she does—not to dismiss the action. 441 U.S. at 765 & n.13. As with *Mach Mining*, the Court could not adopt petitioner's position without repudiating that aspect of *Oscar Mayer*.

c. Petitioner asserts that this Court has "twice held" that filing a charge with the EEOC is a jurisdictional requirement. Petr. Br. 48. That is not so.

The decisions on which petitioner relies stated in passing that "filing timely charges of employment discrimination with the Commission" is one of the "jurisdictional prerequisites" to a Title VII suit. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973); *see Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). But the Court has already specifically disapproved those "scattered references," explaining that "the legal character of the requirement was not at issue in those cases." *Zipes*, 455 U.S. at 395; *see id.* at 393 n.6 (citing *Alexander*, 415 U.S. at 47, and *McDonnell Douglas*, 411 U.S. at 798). And the Court has reiterated that such "'drive-by'" jurisdictional characterizations "should be accorded 'no precedential effect.'" *Arbaugh*, 546 U.S. at 511 (citation omitted).[6]

Those disapproved, drive-by characterizations do not remotely resemble the sort of "long line of this Court's decisions left undisturbed by Congress" that the Court has on two occasions found sufficient to make clear that a requirement is jurisdictional. *Henderson*, 562 U.S. at 436 (citation omitted). In *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), the Court relied on a line of cases dating to 1883 that had *held*—not merely stated in passing—that the limitations period at issue was jurisdictional. *Id.* at 135-36. Similarly, the Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), relied on "a century's worth of precedent" holding that time limits for notices

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[6] Petitioner also invokes the statement in *EEOC v. Shell Oil Co.*, 466 U.S. 54, 65 (1984), that the existence of a charge "is a jurisdictional prerequisite to judicial enforcement of a subpoena issued by the EEOC." Petr. Br. 45. That was another drive-by characterization, and it is entitled to no more weight than the statements in *Alexander* and *McDonnell Douglas*.

of appeal in civil cases are jurisdictional. *Id.* at 209-10 & n.2. This is nothing like those "exceptional" cases. *Auburn*, 568 U.S. at 155.

C. Petitioner's arguments based on Title VII's purpose do not supply the clear statement that is absent from the statutory text.

Lacking any sound footing in text, structure, or precedent, petitioner relies heavily on the assertion that treating the exhaustion requirement as jurisdictional would further Title VII's purposes. Petr. Br. 27-32, 45-47. Even if that were true, appeals to statutory purpose could not supply the clear statement that is missing from Section 2000e-5(f)(1)'s text. The point of the clear-statement rule is to provide a "readily administrable bright line" so that courts and litigants will not be forced to "wrestle" with questions of jurisdictional status. *Arbaugh*, 546 U.S. at 515-16. That benefit would be lost if courts could imply extra-textual jurisdictional requirements based on their views of what would best serve a statute's purpose. In any event, petitioner's purpose-based arguments are unpersuasive even on their own terms. In fact, the delay, inefficiency, and unfairness caused by a jurisdictional exhaustion requirement would *undermine* Title VII.

1. Petitioner's purpose-based arguments are unpersuasive.

a. Most of petitioner's purpose-based arguments simply emphasize that Congress intended to require employees to present Title VII claims to the EEOC before proceeding to Court and that the exhaustion requirement serves important purposes. Petr. Br. 27-32, 45-47. That is true enough so far as it goes: No

one disputes that "an employee must obtain a right-to-sue letter before bringing suit," and no one disputes that courts should "typically insist on satisfaction of that condition." *Mach Mining*, 135 S. Ct. at 1651. But that is irrelevant to the question presented here. Countless statutory requirements—including the elements of virtually every cause of action and the vast majority of procedural rules—are "important and mandatory," but nonetheless subject to forfeiture if a party fails to raise them. *Henderson*, 562 U.S. at 435.

In *Reed Elsevier*, moreover, the Court rejected a virtually identical purpose-based argument. Like petitioner, the court-appointed amicus there argued at length that the copyright-registration requirement should be deemed jurisdictional because it serves important "system-related goals." Amicus Br. at 44-45, *Reed Elsevier*, 559 U.S. 154 (No. 08-103) (quoting *John R. Sand*, 522 U.S. at 133); *see id.* at 45-56. The Court dismissed that argument in a single sentence that could just as easily be a response to much of petitioner's brief: "We do not agree that a condition should be ranked as jurisdictional merely because it promotes important congressional objectives." *Reed Elsevier*, 559 U.S. at 169 n.9.

b. Moreover, the policy objectives petitioner identifies would be equally well-served by a mandatory claim-processing rule. Courts that treat the exhaustion requirement as nonjurisdictional still enforce it when an employer timely raises the issue—typically by dismissing the unexhausted claims or granting

summary judgment to the employer.[6] Faced with that prospect, no rational employee would intentionally bypass the EEOC process in the hopes that defense counsel would simply fail to notice—particularly because filing a charge is neither burdensome nor time-consuming, and can only benefit the employee.

Resisting that natural conclusion, petitioner insists that defendants are "unlikely" to object to an employee's failure to exhaust. Petr. Br. 30. That assertion is, to put it mildly, perplexing. A defendant has every incentive to assert that a Title VII plaintiff has failed to exhaust because such an objection, if timely and meritorious, prevents the plaintiff from recovering. Defense-oriented practice guides thus instruct that "before filing an answer to the Complaint, it is important to determine whether the plaintiff(s) has/have exhausted his/her/their administrative remedies and consider filing a motion to dismiss." Matt W. Lampe & Kristina A. Yost, Jones Day, *Employment Discrimination Class and Collective Actions: Special Issues and Considerations* 6-7 (2018), http://tinyurl.com/y4778tag. And the associations of employers that have filed an amicus brief supporting petitioner conspicuously decline to endorse its description of employers' litigation incentives.

Experience confirms what common sense suggests: Although many circuits have long treated the exhaustion requirement as nonjurisdictional, petitioner musters no evidence that plaintiffs have intentionally

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[6] *See, e.g.*, *Cervantes v. Ardagh Grp.*, 914 F.3d 560, 564-66 (7th Cir. 2019); *Bonilla-Ramirez v. MVM, Inc.*, 904 F.3d 88, 93 (1st Cir. 2018); *Littlejohn v. City of N.Y.*, 795 F.3d 297, 321-22 & n.19 (2d Cir. 2015).

circumvented the EEOC process, or that defendants have strategically declined to object. A decision confirming the nonjurisdictional status of the exhaustion requirement would thus pose no threat to the EEOC's role in Title VII's remedial scheme.

c. Finally, petitioner asserts that Section 2000e-5(f)(1)'s exhaustion requirement "limits the scope of a governmental waiver of sovereign immunity" because States and state agencies are subject to Title VII suits. Petr. Br. 46 (brackets and citation omitted). But Congress validly and unambiguously "abrogat[ed] States' sovereign immunity in Title VII." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 729-30 (2003). This Court has never suggested that a statutory requirement should be deemed jurisdictional merely because it is attached to such an abrogation. To the contrary, *Arbaugh* and *Zipes* held that other Title VII requirements were not jurisdictional even though they, too, could be characterized as limits on the scope of Title VII's abrogation of state sovereign immunity.[7]

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[7] Petitioner also asserts that the exhaustion requirement "indirectly" limits a waiver of federal sovereign immunity because it is "incorporate[d]" into Title VII's federal-sector provision, 42 U.S.C. § 2000e-16. Petr. Br. 46. But whatever relevance sovereign immunity might have to the status of the federal-sector exhaustion requirement, it has no bearing on the question presented here. The federal-sector provision establishes a distinct exhaustion regime, requiring federal employees to present discrimination claims in the first instance to their employing agencies rather than directly to the EEOC. 42 U.S.C. § 2000e-16(c); *see* 29 C.F.R. §§ 1614.101 *et seq.* And although the federal-sector provision incorporates "the provisions of section 2000e-5(f) through (k) . . . as applicable," 42 U.S.C. § 2000e-16(d), it does not incorporate the language at issue here because it makes

2. A jurisdictional exhaustion requirement would undermine Title VII litigation.

A jurisdictional exhaustion requirement is not merely unnecessary to achieve Title VII's goals; it would actually thwart the efficient administration of the statute by burdening both courts and litigants.

a. Start with courts. As petitioner acknowledges, federal courts "have a duty to analyze jurisdictional issues on their own initiative at the outset of a case." Petr. Br. 40. Title VII is one of the most frequently litigated federal statutes, and requiring district courts to determine sua sponte whether every Title VII claim is properly exhausted would drain scarce judicial resources. That is particularly true because Title VII's exhaustion requirement differs markedly from the "[s]imple jurisdictional rules" this Court ordinarily prefers in order to ensure that courts can "readily assure themselves of their power to hear a case." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

A reader of petitioner's brief might assume that Title VII exhaustion questions typically arise when an employee "skip[s] the administrative process" entirely. Petr. Br. 26. But that did not happen here, and it seldom happens at all. Petitioner, for example, cited some thirty circuit-court decisions in arguing that the courts of appeals are divided on the question presented. Pet. 10-16. In only two of them does it appear possible

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exhaustion a prerequisite to suit using different language. *See id.* § 2000e-16(c) (providing that an employee "aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5").

that there was no administrative submission.[8] In the others—as in this case—the issue was the *adequacy* of the administrative submissions: whether they were sufficient to qualify as a charge or otherwise start the administrative process[9]; whether the charge was procedurally proper[10]; whether the claims asserted in court were sufficiently related to the allegations in the charge[11]; whether a charge naming related entities was sufficient to exhaust a claim against an unnamed defendant[12]; whether an employee could rely on a

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[8] *Ziya v. Glob. Linguistic Sol.*, 645 Fed. Appx. 573, 574 (9th Cir. 2016); *Manning v. Carlin*, 786 F.2d 1108, 1109 (11th Cir. 1986).

[9] *Artis*, 630 F.3d at 1034-38; *Sommatino v. United States*, 255 F.3d 704, 709-11 (9th Cir. 2001); *Edwards v. Dep't of the Army*, 708 F.2d 1344, 1347-48 (8th Cir. 1983).

[10] *Davis v. N.C. Dep't of Corr.*, 48 F.3d 134, 138-40 (4th Cir. 1995); *see* Br. for Appellees at 14, *Rester v. Stephens Media, LLC*, 739 F.3d 1127 (8th Cir. 2014) (No. 12-3934).

[11] *Lincoln*, 900 F.3d at 1179-80; *Ruffin v. Lockheed Martin Corp.*, 659 Fed. Appx. 744, 746-47 (4th Cir. 2016); *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 386-87 (2d Cir. 2015); *Tonkin v. Shadow Mgmt., Inc.*, 605 Fed. Appx. 194, 194 (4th Cir. 2015); *Salas v. Indep. Elec. Contractors, Inc.*, 603 Fed. Appx. 607, 608 (9th Cir. 2015); *Hentosh v. Old Dominion Univ.*, 767 F.3d 413, 415-16 (4th Cir. 2014); *Whitaker v. Nash Cty.*, 504 Fed. Appx. 237, 240 (4th Cir. 2013); *Hill v. Nicholson*, 383 Fed. Appx. 503, 508 (6th Cir. 2010); *Jones v. Calvert Grp.*, 551 F.3d 297, 300-04 (4th Cir. 2009); *Robinson v. Geithner*, 359 Fed. Appx. 726, 729-30 (9th Cir. 2009); *Thomas v. Nicholson*, 263 Fed. Appx. 814, 815 n.1 (11th Cir. 2008); *Frederique-Alexandre v. Dep't of Nat. & Envtl. Res.*, 478 F.3d 433, 439-40 (1st Cir. 2007); *Mohr v. Dustrol, Inc.*, 306 F.3d 636, 643-46 (8th Cir. 2002); *Gibson*, 201 F.3d at 991; *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 898-99 (9th Cir. 1994).

[12] *Peppers v. Cobb Cty.*, 835 F.3d 1289, 1296-97 (11th Cir. 2016); *Wilson v. MVM, Inc.*, 475 F.3d 166, 171, 173-76 (3d Cir.

charge filed by another employee[13]; or whether the employee cooperated with the EEOC's investigation.[14]

Answering those questions often requires "a relatively fact-intensive analysis." *Mohr v. Dustrol, Inc.*, 306 F.3d 636, 644 (8th Cir. 2002). And because the administrative process is informal and employees may supplement or amend their allegations during the EEOC's investigation, *see* 29 C.F.R. § 1601.12(b), even routine exhaustion issues can require a court to make factual findings based on "evidence beyond the pleadings," including all of the employee's communications with the EEOC and the "documents generated" during the investigation. *Jenkins v. Educ. Credit Mgmt. Corp.*, 212 Fed. Appx. 729, 732 (10th Cir. 2007).

If the exhaustion requirement were jurisdictional, courts—including courts of appeals—would be obligated to undertake those fact-intensive inquiries sua sponte. And because a federal court "may not rule on the merits of a case without first determining that it has jurisdiction," *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-31 (2007), courts would have to answer complex or difficult exhaustion

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2007); *McKinnon*, 83 F.3d at 504-05; *Stache v. Int'l Union of Bricklayers*, 852 F.2d 1231, 1233-34 (9th Cir. 1988); *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992, 1000, 1010-11 (11th Cir. 1982).

[13] *Robinson*, 359 Fed. Appx. at 729; *De Medina v. Reinhardt*, 686 F.2d 997, 1012-13 (D.C. Cir. 1982); *Jackson*, 678 F.2d at 1011.

[14] *Brown v. Snow*, 440 F.3d 1259, 1263-65 (11th Cir. 2006); *Crawford v. Babbitt*, 186 F.3d 1322, 1326-27 (11th Cir. 1999).

questions even in cases that could easily be dismissed on the merits.[15]

b. Next, consider the opportunities for vexatious behavior by defendants. If the exhaustion requirement were jurisdictional, an employee's asserted failure to satisfy it could be raised at any time—even after trial, on appeal, or for the first time in this Court. Defendants faced with unfavorable outcomes—such as an adverse verdict or, as here, the reversal of summary judgment—would have powerful incentives to scour the record to find some arguable failure to exhaust in the hopes of securing a jurisdictional dismissal. *See, e.g.*, *Francis v. City of N.Y.*, 235 F.3d 763, 765-66 (2d Cir. 2000) (objection raised "[o]ver a month" after "judgment for the plaintiff"); *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992, 1000 (11th Cir. 1982) (objection raised "in [a] motion to vacate the judgment").

Those "[t]ardy jurisdictional objections" would "result in a waste of adjudicatory resources" and "disturbingly disarm litigants." *Auburn*, 568 U.S. at 153. This case vividly illustrates the problem. The district court, the Fifth Circuit, and this Court devoted substantial resources to the merits of Ms. Davis's claim during the five years before petitioner raised the exhaustion issue. The Fifth Circuit's prior decision has become an important precedent on religious discrimination, which Westlaw indicates has been cited in nearly 150 other cases. 765 F.3d 480 (2014). If Ms. Davis's claim were dismissed for lack of jurisdiction, that decision would be vacated and all of the courts'

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[15] *See, e.g.*, *Hill*, 383 Fed. Appx. at 508 (holding that exhaustion is nonjurisdictional in order to bypass the issue and affirm a dismissal on the merits); *Boos*, 201 F.3d at 181-84 (same).

work would be for naught. And even if the Fifth Circuit ultimately held that Ms. Davis properly exhausted, petitioner's belated jurisdictional objection still would have delayed the resolution of her claim by more than three years . That sort of unfairness, inefficiency, and delay would be particularly out of place in Title VII litigation, which Congress required to be "in every way expedited." 42 U.S.C. § 2000e-5(f)(5).

c. Petitioner does not address the burdens a jurisdictional exhaustion requirement would impose on courts, or the inefficiency and delay that would be spawned by belated objections. But petitioner asserts that a jurisdictional requirement would not "create inequities" for employees because "Title VII's timeliness requirement is non-jurisdictional." Petr. Br. 40. Petitioner's theory is apparently that if an employee's claim were dismissed for failure to exhaust, she could still return to court by filing an out-of-time charge with the EEOC and then asking the district court to equitably toll the statute of limitations. *Id.* But it is not clear that the Commission or the courts would routinely find equitable tolling appropriate under those circumstances. *Cf. Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014) (describing the general standard for equitable tolling). And even if they did, it would make little sense to allow a defendant's belated objection to compel the dismissal of a case after years of litigation, only to have the parties start all over again following the exhaustion of the EEOC process.

II. There is no special exception to the clear-statement rule for exhaustion requirements.

In seeking certiorari, petitioner argued that a few circuits have continued to treat the exhaustion requirement as jurisdictional. Pet. 10-14. But petitioner

does not rely on the reasoning of those courts' decisions, which either pre-dated *Arbaugh* or uncritically echoed pre-*Arbaugh* precedents. Instead, petitioner now rests its case on an entirely new theory that *no* court has adopted—and that petitioner itself debuts in its merits brief in this Court. Petr. Br. 15-40.

Petitioner's new theory is that there is a previously unannounced exception to the clear-statement rule for exhaustion requirements. Petitioner maintains that those requirements are jurisdictional if it is "fairly discernible" that Congress intended them to be—and that the requisite intent is fairly discernible virtually any time Congress requires parties to present their claims to an expert agency before proceeding to court.

There is a good reason no court has endorsed (or even suggested) that novel inversion of the clear-statement rule. Petitioner relies on language plucked from decisions addressing an entirely different issue. And petitioner ignores this Court's instruction that the clear-statement rule determines the jurisdictional status of *all* statutory requirements—including exhaustion requirements.

A. Petitioner's "fairly discernible" standard is drawn from decisions addressing an entirely different issue.

1. Petitioner initially frames its new test as asking whether "the 'text, structure, and purpose' of the statute make it 'fairly discernible' that Congress intended to limit jurisdiction" by requiring exhaustion. Petr. Br. 17-18 (quoting *Elgin v. Dep't of Treasury*, 567 U.S. 1, 8-10 (2012)). Taken at face value, that would be an unwarranted departure from the clear-statement rule, but it would not change the outcome here: As the

Fifth Circuit held—and as we showed in Part I—Title VII's text, structure, and purpose do not even "suggest" that the exhaustion requirement is jurisdictional, much less make it fairly discernible. Pet. App. 10a.

Petitioner soon reveals, however, that its "fairly discernible" standard is in fact a presumption that exhaustion requirements are jurisdictional unless Congress specifically provides otherwise. Petitioner asserts that "it is generally 'fairly discernible' that Congress intended to limit jurisdiction" if it established an "'integrated' and 'comprehensive'" scheme requiring parties to present their claims to an expert agency before proceeding to court, and if the agency process furthers the statutory purpose. Petr. Br. 20. Or, as petitioner later puts it, a statutory exhaustion requirement should be deemed jurisdictional absent "an explicit statutory indication" that it is not. *Id.* 52.

2. Petitioner purports to ground that presumption in this Court's decisions in *Elgin*, *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), and *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). But those decisions addressed an entirely different sort of jurisdictional question. Petitioner's conflation of that question with this one proves once more that "[j]urisdiction . . . is a word of many, too many, meanings." *Arbaugh*, 546 U.S. at 510 (citation omitted).

Elgin, *Free Enterprise Fund*, and *Thunder Basin* did not present any question about "whether a procedural rule is 'jurisdictional.'" *Henderson*, 562 U.S. at 434. Instead, each of those cases involved a dispute about whether a statutory scheme giving courts of appeals exclusive jurisdiction to review certain decisions by an administrative agency

precluded district courts from exercising jurisdiction over related claims under 28 U.S.C. § 1331. The "fairly discernible" standard articulated in those decisions is a means of deciding *which court* has jurisdiction over a class of claims—not *which procedural requirements* are jurisdictional.

Thunder Basin involved a statute authorizing the Secretary of Labor to enforce mine safety requirements and providing for review of the Secretary's actions by the Federal Mine Safety and Health Review Commission (FMSHRC). 510 U.S. at 202-04. The statute granted the courts of appeals "exclusive jurisdiction" to review the FMSHRC's decisions. 30 U.S.C. § 816(a)(1); *see Thunder Basin*, 510 U.S. at 208. This Court held that the statute "precludes district court jurisdiction" over challenges to mine safety rules. *Thunder Basin*, 510 U.S. at 207. The Court explained that although the statute does not expressly withdraw jurisdiction under Section 1331, its "comprehensive enforcement structure ... establishes a 'fairly discernible' intent to preclude district court review." *Id.* at 216 (citation omitted). In so doing, the Court applied the same "fairly discernible" standard that it had previously used to decide whether Congress precluded judicial review of a particular category of agency action. *See, e.g., Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 157 (1970).

Free Enterprise Fund also involved a statute giving courts of appeals exclusive jurisdiction over final decisions by an administrative agency—there, the Securities and Exchange Commission (SEC). 15 U.S.C. § 78y(a)(3); *see* 561 U.S. at 489. Invoking *Thunder Basin*, the Government argued that the statute impliedly withdrew district-court jurisdiction

over challenges to the constitutionality of the Public Company Accounting Oversight Board, an entity within the SEC. *Free Enterprise Fund*, 561 U.S. at 489. This Court disagreed, holding that it was not "fairly discernible" that Congress intended to strip the district courts of jurisdiction over such claims. *Id.* (citation omitted). The Court explained that a scheme of administrative and judicial review does not preclude jurisdiction under Section 1331 where "a finding of preclusion could foreclose all meaningful judicial review," where the suit is "wholly collateral to a statute's review provisions," or where the claims are "outside the agency's expertise." *Id.* (quoting *Thunder Basin*, 510 U.S. at 212-13).

Elgin fits the same mold. It involved statutes authorizing federal employees to challenge adverse personnel actions before the Merit Systems Protection Board (MSPB) and giving the Federal Circuit "exclusive jurisdiction" to review the MSPB's decisions. 28 U.S.C. § 1295(a)(9); *see* 5 U.S.C. § 7703(b)(1); *Elgin*, 567 U.S. at 5-6. As this Court explained, that statutory scheme—like the one at issue in *Thunder Basin*—"channel[ed] judicial review" of the covered claims "to a particular court." *Elgin*, 567 U.S. at 9. A group of former federal employees tried to escape that channel by invoking Section 1331 to bring constitutional challenges in district court. *Id.* at 6-8. This Court held that the comprehensive nature of the MSPB review procedures made it "'fairly discernible' that Congress precluded district court jurisdiction over [the employees'] claims," which could instead proceed only through the MSPB and the Federal Circuit. *Id.* at 10 (citation omitted); *see id.* at 10-24.

3. This case does not involve any question like the ones presented in *Elgin*, *Free Enterprise Fund*, and *Thunder Basin*. There are no dueling jurisdictional grants, and it is undisputed that Section 1331 and Section 2000e-5(f)(3) give district courts jurisdiction to hear Title VII claims. The only question in this case—as in others in the clear-statement line—is whether a litigant's failure to comply with a procedural rule deprives a court of jurisdiction under those otherwise-applicable jurisdictional statutes.

Elgin, *Free Enterprise Fund*, and *Thunder Basin* did not involve any question of that sort, and the "fairly discernible" standard applied in those cases is not a test for distinguishing exhaustion requirements that are jurisdictional from those that are not. The plaintiffs in *Elgin* and *Thunder Basin*, for example, could not have sued in district court even if they *had* exhausted administrative remedies, because Congress entirely withdrew district-court jurisdiction over the relevant class of claims. *See Elgin*, 567 U.S. at 5; *Thunder Basin*, 510 U.S. at 209. Conversely, *Free Enterprise Fund*'s holding that the "fairly discernible" standard was not satisfied did not mean that exhaustion was a nonjurisdictional requirement subject to waiver and forfeiture. Instead, it meant that the plaintiffs were not required to exhaust their claims at all, and could proceed in district court despite the Government's timely objection. 561 U.S. at 489-90.

4. Of course, a question like the one presented here certainly *can* arise under the statutory schemes at issue in *Elgin*, *Free Enterprise Fund*, and *Thunder Basin*. A federal employee might, for example, seek to assert a claim in the Federal Circuit that she failed to raise in the MSPB. If the government failed to object

in a timely fashion, the Federal Circuit would have to decide whether the relevant statutes make exhaustion of all claims a jurisdictional requirement.[16] But *Elgin*, *Free Enterprise Fund*, and *Thunder Basin* had no occasion to consider that sort of question—and they provide no reason to think that it should be answered using anything other than the established clear-statement rule.

B. Petitioner identifies no other basis for departing from the clear-statement rule or treating exhaustion requirements as presumptively jurisdictional.

In addition to invoking the inapposite "fairly discernible" cases, petitioner suggests more generally that exhaustion requirements should be exempt from the clear-statement rule because this Court has treated them as presumptively jurisdictional. Petr. Br. 20-23, 35-36. In fact, the Court has applied the clear-statement rule to exhaustion requirements—and has specifically identified them as paradigmatic examples of nonjurisdictional claim-processing rules. The scattered pre-*Arbaugh* decisions on which petitioner relies are not to the contrary.

1. Petitioner starts from the mistaken premise that this Court has not applied the clear-statement rule in "the exhaustion context." Petr. Br. 40. In fact, the Court has twice applied the rule to hold that an exhaustion requirement in a "statutory scheme of

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[16] In fact, although the Federal Circuit "ordinarily [will] not consider questions not raised before the [MSPB]," it has long treated that limitation as nonjurisdictional and has made exceptions when, for example, exhaustion would have been futile. *Beard v. GSA*, 801 F.2d 1318, 1321 (1986).

administrative and judicial review" (Petr. Br. 20) is not jurisdictional.

In *Homer City*, the Court applied the clear-statement rule to the Clean Air Act's requirement that parties seeking judicial review of administrative regulations must first raise their objections with "reasonable specificity" before the agency. 572 U.S. at 511 (quoting 42 U.S.C. § 7607(d)(7)(B)). Citing *Arbaugh*, the Court held that this exhaustion requirement is not jurisdictional because it "does not speak to a court's authority." *Id.*

In *Union Pacific*, the Court applied the clear-statement rule to the Railway Labor Act's requirement that employees and rail carriers "attempt settlement 'in conference'" before resorting to arbitration and potential judicial review. 558 U.S. at 73-74 (quoting 45 U.S.C. § 152). The Court held that "the requirement to conference is not 'jurisdictional'" because it is not framed in jurisdictional terms. *Id.* at 83. In so doing, the Court analogized that requirement to the one at issue here, explaining that "conferencing is surely no more 'jurisdictional' than is the presuit resort to the EEOC held forfeitable in *Zipes*." *Id.*

More broadly, a plurality of this Court recently identified "an exhaustion requirement"—along with "a filing deadline"—as one of two paradigmatic examples of a nonjurisdictional "claim-processing rule." *Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018). And the Court has "treated as nonjurisdictional" other "threshold requirements that claimants must complete, or exhaust, before filing a lawsuit." *Reed Elsevier*, 559 U.S. at 166; *see, e.g.*, *id.* at 161-166 (copyright registration requirement); *Jones v. Bock*, 549 U.S. 199, 211-12 (2007) (Prison Litigation Reform Act exhaustion

requirement); *Woodford v. Ngo*, 548 U.S. 81, 101 (2006) (same); *Strickland v. Washington*, 466 U.S. 668, 684 (1984) (habeas statute exhaustion requirement).

2. Courts of appeals, too, have held that "under *Arbaugh*" and its progeny, "absent a clear statement from Congress, exhaustion requirements will be found to be nonjurisdictional." *Munsell v. Dep't of Agric.*, 509 F.3d 572, 581 (D.C. Cir. 2007). Applying this rule, courts have held that 7 U.S.C. § 6912(e)—which mandates that a plaintiff "exhaust all administrative appeal procedures" before bringing an action in court—is a "mandatory, but nonjurisdictional, exhaustion requirement." *Munsell*, 509 F.3d at 581; *see, e.g.*, *Dawson Farms, LLC v. Farm Serv. Agency*, 504 F.3d 592, 606-07 (5th Cir. 2007).

To take just one of many other examples, courts of appeals have also applied the clear-statement rule to a statute prescribing that a "judgment for damages shall not be awarded" in certain suits against the Internal Revenue Service "unless the court determines that the plaintiff has exhausted the administrative remedies available." 26 U.S.C. § 7433(d). "In the aftermath of *Arbaugh*," the Sixth Circuit held, "it no longer is appropriate to treat the exhaustion requirements for bringing a § 7433 claim as jurisdictional." *Hoogerheide v. IRS*, 637 F.3d 634, 636 (2011); *see, e.g.*, *Hassen v. Gov't of Virgin Islands*, 861 F.3d 108, 114 (3d Cir. 2017).

3. Of course, the fact that exhaustion requirements are subject to the clear-statement rule and are ordinarily nonjurisdictional does not mean that they are *never* jurisdictional. Congress may, if it speaks clearly, condition a court's subject-matter jurisdiction on a specified administrative action. The Hobbs Act,

for example, provides that the courts of appeals have "jurisdiction" to review a variety of administrative actions, including "final orders" of the Federal Communication Commission and other agencies. 28 U.S.C. § 158. That express jurisdictional language makes clear that a final administrative decision is a jurisdictional requirement—just as a final district court decision is a jurisdictional requirement for an appeal under 28 U.S.C. § 1291.

But the exhaustion requirement at issue here is entirely different. Title VII does not grant district courts jurisdiction to review final decisions by the EEOC—indeed, it does not empower the EEOC to decide Title VII claims at all. *See Alexander*, 415 U.S. at 44. Instead, Title VII merely requires an employee to file a charge with the EEOC and obtain a right-to-sue letter before bringing a de novo suit in district court. That is a garden-variety "prerequisite to suit," *Mach Mining*, 135 S. Ct. at 1651-52—not a jurisdictional requirement.

4. The hodgepodge of other decisions on which petitioner relies (Petr. Br. 20-23, 52-54) do not support its assertion that exhaustion requirements are presumptively jurisdictional. All of those decisions pre-dated this Court's articulation of the clear-statement rule—in most cases by decades. Some of them thus simply reflect "less than meticulous" use of the term "jurisdictional" to refer to something other than the subject-matter jurisdiction of the courts. *Arbaugh*, 546 U.S. at 511; *see Sims v. Apfel*, 530 U.S. 103, 108 (2000); *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 49-50 (1998); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-46

(1959); *Macauley v. Waterman S.S. Corp.*, 327 U.S. 540, 544-45 (1946).

Other decisions are irrelevant because they did not address whether the requirement at issue was jurisdictional. In *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), the Court expressly stated that it "need not determine whether [the relevant provision] is jurisdictional." *Id.* at 31. And in *McNeil v. United States*, 508 U.S 106 (1993), the Court affirmed the dismissal of a plaintiff's claim for failure to satisfy 28 U.S.C. § 2675(a)'s exhaustion requirement, but did not endorse the lower courts' statement that the requirement is jurisdictional. *Id.* at 113. As the Government had explained, the Court was not required to "reach the question whether Section 2675(a)'s requirements are jurisdictional" because the Government had preserved the exhaustion issue below. U.S. Br. at 15 n.8, *McNeil*, 508 U.S. 106 (No. 92-6033); *see also FPC v. Colo. Interstate Gas Co.*, 348 U.S. 492, 498-99 (1955) (enforcing an exhaustion requirement without addressing its jurisdictional status).

Petitioner's remaining decisions involve the provisions governing review of certain Social Security benefit determinations, 42 U.S.C. § 405(g) and (h). Petr. Br. 21. But unlike Section 2000e-5(f)(1), those statutes include express jurisdictional language. Section 405(g) grants district courts jurisdiction to review the relevant administrative decisions, and Section 405(h) expressly withdraws jurisdiction "under [S]ection 1331 or 1346 of Title 28." And even then, the decisions on which petitioner relies do not interpret those provisions to create the sort of jurisdictional requirement that petitioner seeks here. For example, they do not deprive the courts of

jurisdiction to consider a claim that the plaintiff "failed to raise" during administrative proceedings. *Mathews*, 424 U.S. at 329-30.

* * *

In *Arbaugh*, this Court adopted the clear-statement rule as a "readily administrable bright line" for Congress, the courts, and litigants. 546 U.S. at 516. In the intervening years, this Court's consistent application of that bright-line rule has brought much-needed clarity and certainty to an area of the law that had been plagued by confusion. The clear-statement rule resolves this case, and the Court should decline petitioner's invitation to depart from it.[17]

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[17] Petitioner asserts that if the Court holds that exhaustion is a jurisdictional requirement, it should also hold that Ms. Davis failed to exhaust her religious-discrimination claim. Petr. Br. 54-56. Ms. Davis did, in fact, exhaust that claim. BIO 22-23. But petitioner provides no reason for this Court to address in the first instance a factbound question that was neither passed upon below nor "fairly included" in the question petitioner asked this Court to decide. Sup. Ct. R. 14.1(a).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

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No. 18-525

IN THE
Supreme Court of the United States

FORT BEND COUNTY,
Petitioner,

v.

LOIS M. DAVIS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

This case sits at the intersection of two lines of this Court's precedent. In a series of cases dating back over a century, the Court has held that "when Congress creates procedures designed to permit agency expertise to be brought to bear on particular problems," it generally intends to "limit [the] jurisdiction" of the district courts. *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010) (internal quotation marks omitted). This longstanding presumption is rooted in the common-sense proposition that Congress is unlikely to intend to leave open the courtroom doors for those who evade a statutorily mandated administrative process. And

the presumption is strong enough that it displaces district court jurisdiction even in some cases where the statute is "facially silent" as to whether the claims in question must be brought through the administrative scheme. *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 208 (1994).

In another set of cases, beginning with *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500 (2006), the Court, "mindful of the consequences of typing [a requirement] a determinant of subject-matter jurisdiction," has insisted on a clear statement before deeming a statutory requirement jurisdictional. *Id.* at 513-515.

The primary question in this case is which line of precedent controls the analysis of Title VII's exhaustion requirement, which all agree is part of a scheme of administrative and judicial review that mandates that plaintiffs present their claims to the Equal Employment Opportunity Commission in the first instance. Petitioner submits that the answer is dictated by our constitutional system of separated powers, which commits control over jurisdiction to Congress, not the courts. Where the Court must choose between a standard predicated on congressional intent, and a court-made rule based in prudential considerations, congressional intent trumps.

Indeed, this Court's clear-statement precedent recognizes as much. While respondent and the Government assert that a clear statement is *always* necessary, this Court has recognized at least two exceptions, designed to ensure that the rule applies only when it captures congressional intent: The Court has not demanded a clear statement where a requirement inherently implicates the scope of the judicial power or where "a long line of this Court's

decisions left undisturbed by Congress has treated a similar requirement as jurisdictional." *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 436 (2011) (internal quotation marks omitted).

Both exceptions apply to statutory exhaustion requirements like the one in Title VII. Such provisions necessarily implicate the judiciary's adjudicatory power by assigning authority over claims to an agency in the first instance. That is why no party has been able to locate a single case in which this Court has held an analogous statutory exhaustion requirement non-jurisdictional, and why petitioner can point to a "long line" of this Court's precedent deeming such statutory mandates jurisdictional. *Id.*

Respondent and the Government attempt to distinguish that precedent, but their efforts fall flat. Contrary to respondent's argument, these cases do not merely concern *which* court should review a claim; in each one, the Court focused on whether the statutory scheme made it "fairly discernible" that Congress intended to "allocate[ ] initial review to an administrative body." *Thunder Basin*, 510 U.S. at 207. Nor does Title VII fall outside this line of cases, as the Government argues, because it empowers the EEOC to resolve claims through investigation and conciliation, rather than adjudication. That is a feature, not a bug: Congress sought to eliminate discriminatory employment practices through "[c]ooperation and voluntary compliance," *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015), and so vested "exclusive jurisdiction" first in the hands of an expert agency that could pursue cooperative means for claim resolution and avoid the need to resort to courts. *EEOC* v. *Waffle House, Inc.*, 534

U.S. 279, 288 (2002). Courts have no basis to excuse compliance with that scheme because Congress chose to make the administrative process *less* adversarial.

In any event, even if respondent and the Government were correct that *Arbaugh*'s clear-statement rule applies to this case, Title VII's exhaustion requirement would still be jurisdictional. The text, structure, and relevant precedent all demonstrate that Congress clearly intended that result. And Congress's purposes in enacting Title VII may be vindicated only through a jurisdictional rule.

The judgment should be reversed.

ARGUMENT

I. TITLE VII'S EXHAUSTION REQUIREMENT IS JURISDICTIONAL.

A. *Arbaugh*'s Clear-Statement Rule Does Not Apply.

1. Petitioner's opening brief explained that this Court applies a "fairly discernible" standard to determine whether statutory exhaustion requirements mandating that a plaintiff present her claim first to an expert federal agency are jurisdictional. Pet. Br. 18-23. Respondent and the Government stake their case on the proposition that *Arbaugh*'s clear-statement rule should instead apply. By their account, *Arbaugh* dictates that a clear statement is always necessary to deem a statutory requirement jurisdictional, even in the case of an integrated scheme of administrative and judicial review. Resp. Br. 14-15; U.S. Br. 12-14.

Respondent and the Government misstate this Court's approach. In recent years, this Court has sometimes applied a clear-statement rule to deter-

mine whether certain kinds of statutory conditions are jurisdictional. *See* Erin Morrow Hawley, *The Supreme Court's Quiet Revolution: Redefining the Meaning of Jurisdiction*, 56 Wm. & Mary L. Rev. 2027 (2015). In many cases, that rule is "suited to capture Congress' likely intent." *Henderson*, 562 U.S. at 436; *see United States* v. *Kwai Fun Wong*, 135 S. Ct. 1625, 1631 (2015). But not always. In at least two circumstances, the Court has eschewed application of the clear-statement rule because it is unlikely to approximate congressional intent.

First, the Court has not required a clear statement if a provision necessarily "governs a court's adjudicatory capacity." *Henderson*, 562 U.S. at 435. Where provisions are inherently jurisdictional, this Court needs no further indication that Congress intended to "speak[] * * * to a court's power." *Wong*, 135 S. Ct. at 1632.

Second, even when a statutory provision does not obviously implicate the scope of judicial power, the Court "will presume" that the requirement is jurisdictional if "a long line of this Court's decisions left undisturbed by Congress has treated a similar requirement as jurisdictional." *Henderson*, 562 U.S. at 436; *see John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 135-136 (2008). As this Court put it in *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154 (2010), the "historical treatment" of a particular "type of limitation" may dictate that it is "properly ranked as jurisdictional *absent an express designation*." *Id.* at 168 (emphasis added).

These exceptions make sense. If a rule naturally touches on the scope of the courts' power, Congress has no need to expressly label it jurisdictional. And

this Court "normally assume[s]" that Congress legislates against the backdrop of Supreme Court precedent, and so intends to incorporate the settled meaning of certain types of statutory provisions. *Ryan* v. *Gonzales*, 568 U.S. 57, 66 (2013) (internal quotation marks omitted).

The exceptions are also rooted in our constitutional system of separation of powers. "Within Constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider." *Bowles* v. *Russell*, 551 U.S. 205, 212 (2007). "To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely." *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 245 (1845). Accordingly, *Arbaugh*'s clear-statement rule may only apply to the extent it accurately reflects Congress's intent. When it ceases to do so, this Court has no warrant to ignore Congress's likely intent based on a judicially crafted presumption.

2. Exhaustion provisions like the one in Title VII satisfy *both* exceptions to the clear-statement rule. They are therefore analyzed under the "fairly discernible" standard agreed upon by all nine Justices in *Elgin* v. *Department of Treasury*, 567 U.S. 1 (2012). *Id.* at 9 (majority opinion); *see id.* at 25 (Alito, J., dissenting) ("When Congress creates an administrative process to handle certain types of claims, it impliedly removes those claims from the ordinary jurisdiction of the federal courts.").

Statutory exhaustion requirements fit within the first exception because provisions allocating power over a particular claim between the Executive and the Judiciary inherently concern "the control of

Congress over the jurisdiction of courts of its own creation." *Hallowell* v. *Commons*, 239 U.S. 506, 509 (1916). Over a century ago, Justice Holmes found it obvious that a "district court had no jurisdiction" where a statute gave the Secretary of the Interior the exclusive "power" to decide the claim. *Id.* at 507-508. Statutory exhaustion requirements that vest initial authority in the hands of an administrative body similarly displace the jurisdiction of the courts while the agency is entrusted with power over a claim. *See Elgin*, 567 U.S. at 9-10.

They also fit within the second exception because a "long line of this Court's decisions left undisturbed by Congress *** treat[s] [these] requirement[s] as jurisdictional." *Henderson*, 562 U.S. at 436. According to a seminal 1939 article on administrative exhaustion, the principle that the courts' jurisdiction is temporarily displaced where Congress "confide[s] preliminary processes to administrative bodies" traces its origins at least as far back as 1907. Raoul Berger, *Exhaustion of Administrative Remedies*, 48 Yale L.J. 981, 993-995 (1939) (cited in *United States* v. *Jones*, 336 U.S. 641, 652 n.14 (1949); *Yakus* v. *United States*, 321 U.S. 414, 472 n.22 (1944)). In *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), the Court held that a district court was without jurisdiction to pass on a particular issue because it had not yet been resolved by the relevant federal agency, even though the statute in question explicitly preserved common law actions like the one petitioner was pursuing. *Id.* at 438-439.

Since then, the Court has remained committed to the view that, when Congress empowers a federal

agency to consider a claim in the first instance, it generally intends to bar jurisdiction over claims that have not been presented to the agency. In *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), for example, the Court described the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Id.* at 50-51. Likewise, in *United States* v. *Ruzicka*, 329 U.S. 287 (1946), the Court held that an administrative "procedure devised by Congress" implicitly foreclosed district court jurisdiction over a claim the agency had not considered. *Id.* at 292.

By 1965—one year after Title VII was enacted, and seven years before the 1972 amendments that created the current statutory scheme—this Court found it obvious that where Congress establishes "statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive." *Whitney Nat'l Bank in Jefferson Parish* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965). And in case after case since then—including two post-dating *Arbaugh*—the Court has confirmed that "[p]rovisions for agency review" will "implicitly * * * restrict judicial review" so long as it is "fairly discernible" that Congress intended to "limit jurisdiction." *Free Enter. Fund*, 561 U.S. at 489.

3. Notwithstanding these precedents, respondent and the Government insist that statutory provisions requiring a plaintiff to exhaust her claim before an expert federal agency are subject to *Arbaugh*'s clear-statement rule. They rest that assertion almost entirely on a series of cases in which they claim this

Court applied the clear-statement rule to exhaustion requirements. But the cases they cite merely demonstrate that, like jurisdiction, exhaustion "is a word of many, too many meanings." *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 90 (1998) (internal quotation marks omitted). Not one of their cited decisions concerns an exhaustion provision that requires a plaintiff to present an alleged violation of her statutory rights first to an expert federal agency and then to the courts.

Many of respondent's and the Government's supposed "exhaustion" cases instead involve statutes—like the Prison Litigation Reform Act and the Antiterrorism and Effective Death Penalty Act—that require a litigant to pursue available *state* remedies before going to federal court. *See* Resp. Br. 42-43 (citing *Jones* v. *Bock*, 549 U.S. 199, 211-212 (2007); *Woodford* v. *Ngo*, 548 U.S. 81, 101 (2006); *Strickland* v. *Washington*, 466 U.S. 668, 684 (1984)); U.S. Br. 24 (citing *Woodford* and *Jones*). But statutes requiring recourse to state processes implicate very different concerns than those involving federal agencies. Congress does not control the jurisdiction of state entities, and it is unlikely to intend to make federal-court jurisdiction turn on a litigant's ability to pursue state remedies if Congress cannot ensure that they will be available. *Cf. Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979).

The cases that respondent and the Government cite involving federal agencies are also inapposite. In *Reed Elsevier*, the provision in question required most (but not all) would-be plaintiffs to register their copyrights before bringing suit for copyright infringement. 559 U.S. at 157-158. That statute did

not require that a party present a claimed statutory violation to the agency, nor authorize the agency to attempt to resolve such claims.

In *Union Pacific Railroad Co.* v. *Brotherhood of Locomotive Engineers*, 558 U.S. 67 (2009), the provision at issue required employers and employees to informally confer before presenting their claims to the agency. *Id.* at 72-74, 86. This conferral requirement did not vest any authority in the agency (the conference was to be carried out by the parties without agency oversight); it could be overridden by a collective bargaining agreement; and the Court repeatedly noted that only *the agency*—which had no authority to decide the bounds of its own jurisdiction—had deemed the requirement jurisdictional. *Id.* at 72-74, 77-78, 82-85.

EPA v. *EME Homer City Generation, L.P.*, 572 U.S. 489 (2014), in turn, considered a statute requiring an entity to object to a proposed regulation during a notice-and-comment period before raising those issues in a petition for review of the final regulation. *Id.* at 511-512. But a requirement that a party inform an agency of the perceived problems with a potential regulation before its promulgation is different than a requirement that a party pursue an administrative channel for resolving a claim that her statutory rights have actually been violated. Further, the statutory requirement in *EME Homer* had multiple express exceptions, making plain that it was non-jurisdictional. 42 U.S.C. § 7607(d)(7)(B); *cf. Reed Elsevier*, 559 U.S. at 165.

In short, neither respondent nor the Government has identified even a single case in which this Court has applied the clear-statement rule to a statutory

provision requiring plaintiffs to invoke the claims resolution process of an expert federal agency in the first instance—let alone held such a requirement non-jurisdictional.

B. The Other Side Cannot Distinguish The Precedent Holding Analogous Statutory Exhaustion Requirements Jurisdictional.

Title VII's exhaustion requirement falls comfortably within the body of precedents deeming administrative review schemes jurisdictional. Pet. Br. 23-32. Respondent and the Government seek to distinguish these precedents, but their proposed distinctions fail.

1. Respondent argues that the cases on which petitioner relies are really about "*which court* has jurisdiction over a class of claims—not *which procedural requirements* are jurisdictional." Resp. Br. 38-39. That, however, is not what these decisions say. In *Thunder Basin*, the Court began its analysis by asking whether the statutory scheme made it "fairly discernible" that Congress intended to "allocate[] initial review to an *administrative body*." 510 U.S. at 207 (emphasis added). In *Free Enterprise Fund*, the Court phrased the inquiry as whether the relevant "[p]rovisions for *agency* review" reflected an "intent to limit jurisdiction" over the claims in question. 561 U.S. at 489 (emphasis added). And in *Elgin*, the Court stated the question as whether "a statutory scheme of *administrative* and judicial review" precluded plaintiffs "from pursuing their claims in federal district court." 567 U.S. at 8 (emphasis added).

It is also not what these decisions mean. In each case, the Court's analysis turned primarily on whether Congress intended an expert administrative

agency or a generalist court to exercise authority over the relevant claims in the first instance. *See, e.g.*, *Thunder Basin*, 510 U.S. at 215 ("we conclude that exclusive review * * * is appropriate since 'agency expertise [could] be brought to bear on' the statutory questions presented here" (quoting *Whitney*, 379 U.S. at 240)); *Elgin*, 567 U.S. at 23 (quoting same); *Free Enter. Fund*, 561 U.S. at 489 (same). That focus would make little sense if the Court's primary concern was which court had jurisdiction.

Further, respondent fails to point to any language in these decisions that would limit their application to statutory schemes that culminate in judicial review in the circuit courts. To the contrary, in *Free Enterprise Fund*, the Court viewed *Ruzicka* as part of this line of precedent, 561 U.S. at 491, even though "ultimate review" of the claims in that case was in the *district* courts, 329 U.S. at 292.

2. The Government, for its part, asserts that *Thunder Basin* and its progeny are distinguishable because they involve schemes for "administrative *adjudication*," U.S. Br. 27 (emphasis added), whereas Title VII enacts a scheme in which the agency is "empowered" to resolve claims "by informal methods of conference, conciliation, and persuasion," 42 U.S.C. § 2000e-5(a), (b). But, if anything, the non-adversarial nature of Title VII's administrative procedures provides an additional reason why the exhaustion requirement *should* be deemed jurisdictional. Congress selected "[c]ooperation and voluntary compliance as its preferred means" for resolving claims of employment discrimination. *Mach Mining*, 135 S. Ct. at 1651. Congress determined that goal could be achieved only if every claim was first pre-

sented to the administrative body charged with finding a cooperative means to resolve the alleged statutory violation, thereby decreasing the burden on courts, and increasing the chances that the employer-employee relationship will not be irredeemably damaged. *See* Pet. Br. 28. Allowing plaintiffs to skip the administrative process and go directly to litigation *because* EEOC proceedings are non-adversarial would turn Congress's scheme on its head.

Moreover, nothing in the *Thunder Basin* line of cases suggests that their reach is limited to statutes involving administrative adjudication. In each case, the Court has referred to the statutes as providing for administrative *"review."* *Elgin*, 567 U.S. at 5 (emphasis added); *Free Enter. Fund*, 561 U.S. at 489; *Thunder Basin*, 510 U.S. at 206. That term describes the EEOC's intricate and comprehensive process of investigation and conciliation. *See* Pet. Br. 23-27.

Elgin also refutes the Government's suggestion (at 26) that jurisdictional exhaustion only makes sense where the administrative process will produce a decision for the court to review. The *Elgin* Court acknowledged that the agency might not have the "authority" to issue a merits decision on petitioners' constitutional claims, but the Court nonetheless recognized a "jurisdictional rule" requiring the claims to be presented to the agency in the first instance. 567 U.S. at 15, 17-18.

3. Respondent's and the Government's theories also fail because they cannot account for many of this Court's cases holding statutory exhaustion requirements jurisdictional.

In *McNeil* v. *United States*, 508 U.S. 106 (1993), for example, the Court affirmed the jurisdictional dismissal of a claim because the petitioner failed to adhere to a statutory provision in the Federal Tort Claims Act (FTCA) requiring him to "exhaust[ ] [his] administrative remedies" before bringing suit. *Id.* at 113. The Court reached this result even though, like Title VII, the FTCA merely requires a party to present her claims to a federal agency to give it a chance to "consider[ ]" the claims and arrange a "settlement" before suit may be brought in *district* court. *Id.* at 112 n.7 (quoting S. Rep. No. 89-1327, at 3 (1966)). In the wake of *McNeil*, nearly every circuit has viewed the FTCA's exhaustion requirement as jurisdictional. *See, e.g.*, *Smith* v. *Clinton*, 886 F.3d 122, 127 (D.C. Cir.) (per curiam) (holding that, under the FTCA, district court lacked jurisdiction because plaintiffs "failed to exhaust their administrative remedies"), *cert. denied*, 139 S. Ct. 459 (2018); *see also Mader* v. *United States*, 654 F.3d 794, 805 & n.10 (8th Cir. 2011) (en banc) (collecting cases).

Although the Government now ignores *McNeil*, it too has interpreted the case that way. As recently as 2014, it argued that *McNeil* settled that the FTCA's exhaustion requirement is jurisdictional. *See, e.g.*, Brief for Petitioner at 50, *United States* v. *June*, No. 13-1075 (U.S. Sept. 9, 2014). Respondent suggests that *McNeil* did not really issue a jurisdictional holding because the Government's brief in *McNeil* suggested that the Court did not need to decide the issue. Resp. Br. 45. The Court, however, did not accept that suggestion: It affirmed the lower court's jurisdictional holding without suggesting that the dismissal should have been on the merits. 508 U.S. at 113. And it went out of its way to note that failure

to comply with the FTCA's exhaustion requirement should not be "excuse[d]," a hallmark of a jurisdictional requirement. *Id.*

Respondent and the Government similarly flounder in their efforts to distinguish the Court's repeated holdings that the Social Security Act (SSA) prevents a *district* court from assuming jurisdiction over a disability benefits claim until it has been presented to the agency. *See* Pet. Br. 21-22. They contend that this precedent is irrelevant because the SSA contains another provision "explicit[ly] withdraw[ing]" the statutory grants of district court jurisdiction in Sections 1331 and 1346. Resp. Br. 18; *see* U.S. Br. 25. But this Court implicitly rejected that distinction in *Thunder Basin*, in which it repeatedly relied on the SSA precedents even while acknowledging that the Mine Act was "facially silent" as to whether it limited jurisdiction over the claims at issue. 510 U.S. at 208.

Finally, respondent and the Government spend almost no time discussing the statutory exhaustion scheme on which Title VII was based: the National Labor Relations Act (NLRA). *See* Pet. Br. 35-36. The Government does not even mention the NLRA. Respondent hardly does better: It dismisses the *five* NLRA cases petitioner cited as reflecting "'less than meticulous' use of the term 'jurisdictional.'" Resp. Br. 44. But most of these cases involved an express holding with respect to the power of the courts to address NLRA claims in the first instance. Pet. Br. 20-22. For example, in *Marquez* v. *Screen Actors Guild, Inc.*, 525 U.S. 33 (1998), the Court considered at length which forms of statutory claims fall within the "primary jurisdiction" of the agency and there-

fore deprive the district courts of power to "exercise jurisdiction" over them. *Id.* at 49-50 (1998); *see id.* at 50 (citing additional cases recognizing that courts typically lack the power to "resolve statutory issues under the NLRA in the first instance"). This Court will generally pause before adopting a position that requires it to ignore or overrule a whole body of its precedent, and it should not vary from that practice here.

4. The Government offers one final suggestion: It posits that even if Title VII's exhaustion requirement is jurisdictional, that requirement is satisfied so long as a plaintiff has filed *some* charge with the EEOC, even if that charge does not contain the claim on which she seeks judicial relief. U.S. Br. 28. But an exhaustion requirement would be pointless if it did not attach to specific claims. The Government clearly recognizes as much because, three pages later, it states that if an employer properly raises an exhaustion defense, it is entitled to "seek dismissal" of any particular "claims" omitted from the charge. *Id.* at 31.

The Government does not explain what in the statute would permit the Court to infer that Congress intended the exhaustion requirement to function in this way—mandating claim-specific exhaustion, but permitting some lesser form of exhaustion for jurisdictional purposes. The Government relies on *Sims* v. *Apfel*, 530 U.S. 103 (2000), an SSA case holding that a court will not lightly apply a prudential "issue exhaustion" requirement. But the Government seems to have confused the words "issue" and "claim." In *Sims*, it was undisputed that the plaintiff had presented her only disability benefits *claim* to

both the administrative law judge and the Appeals Council. 530 U.S. at 106-107. The *Sims* Court was considering the assertion that it should impose an extra-statutory requirement that a plaintiff must inform the Appeals Council of every perceived defect in an ALJ's decision before presenting those "issues" to the reviewing court. *Id.* Here, in contrast, the District Court correctly found that respondent had not presented her *claim* of religious discrimination to the agency at all. Pet. Br. 54-56.

II. EVEN UNDER THE CLEAR-STATEMENT RULE, TITLE VII'S EXHAUSTION REQUIREMENT IS JURISDICTIONAL.

While statutory exhaustion requirements like the one in Title VII are properly assessed under the "fairly discernible" standard, petitioner would also prevail under the clear-statement rule.

Respondent and the Government contend that Title VII lacks a clear statement because it "neither uses the word 'jurisdiction' nor otherwise refers to the courts' authority." Resp. Br. 17; *see* U.S. Br. 15-16. But Congress need not "incant magic words" to make a requirement jurisdictional; it simply must make clear that it intends the requirement to "cabin a court's power." *Wong*, 135 S. Ct. at 1632. And from start to finish, Section 2000e-5 frames the requirement to file a charge with the EEOC in jurisdictional terms. It opens by "empower[ing]" the Commission to resolve claims of discrimination—language that this Court has held "grant[s] the EEOC exclusive jurisdiction over the claim for 180 days after the employee files a charge." *Waffle House*, 534 U.S. at 288. It then vests courts with "jurisdiction" only over "actions brought under this subchapter"—that is,

actions "brought against the respondent *named in the charge*" after "a charge *filed with the Commission*" has been dismissed or 180 days have passed. 42 U.S.C. § 2000e-5(f)(1), (3) (emphases added).

The structure of Title VII reinforces the jurisdictional character of its exhaustion requirement. The requirement is located within the statute's jurisdictional grant: Section 2000e-5(f). *See Henderson*, 562 U.S. at 439. Respondent contends that the statute's jurisdictional provision consists solely of Section 2000e-5(f)(3). Resp. Br. 19. But *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), said otherwise: It described "[t]he provision granting district courts jurisdiction under Title VII" as "42 U.S.C. §§ 2000e-5(e) *and* (f)," at a time when Section 2000e-5(e) consisted solely of what is now subsection (f)(1)—that is, the exhaustion requirement. 455 U.S. at 393 (emphasis added); *see* 42 U.S.C. § 2000e-5(e) (1970). Congress later reaffirmed that understanding by moving the exhaustion requirement into subsection (f), which Congress itself had captioned "Courts; Jurisdiction." Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(f), 78 Stat. 241, 260.

Further, the exhaustion requirement contains "no exceptions." *Patchak* v. *Zinke*, 138 S. Ct. 897, 905 (2018). Respondent claims this Court has crafted an exception to the exhaustion requirement for "unnamed [class] members." Resp. Br. 22. Not so. The Court held, based primarily on legislative history, that where a class representative exhausts a claim that an employer engaged in a pattern or practice of discrimination, courts may grant *relief* on that claim for the entire class. *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975). It did not hold

that courts have jurisdiction to consider an unexhausted claim, in the class action context or elsewhere.

Finally, this Court has held on at least *five* separate occasions that Title VII's exhaustion requirement is jurisdictional. *See McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *Gen. Tel. Co. of Nw., Inc.* v. *EEOC*, 446 U.S. 318, 326 (1980); *Waffle House*, 534 U.S. at 288; *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 65 (1984). Respondent entirely ignores two of these precedents, both of which stated that the filing of a charge gives the EEOC a period of "exclusive jurisdiction" over Title VII claims. *Waffle House*, 534 U.S. at 288; *see Gen. Tel. Co.*, 446 U.S. at 326. Respondent dismisses the other three decisions as "'drive-by' jurisdictional characterizations." Resp. Br. 26 & n.5. But the term "drive-by" is not a get-out-of-jail-free card for any jurisdictional precedent a litigant cannot distinguish. It refers to cases in which this Court "dismiss[ed] 'for lack of jurisdiction' * * * without explicitly considering whether the dismissal should be for lack of subject matter jurisdiction." *Arbaugh*, 546 U.S. at 511 (internal quotation marks omitted).

These cases do not fit that description. In *McDonnell Douglas* and *Alexander*, the Court characterized Title VII's claim-filing requirement as a "jurisdictional prerequisite[]" specifically to contrast it with statutory requirements that *do not* "divest[] federal courts of jurisdiction." *Alexander*, 415 U.S. at 47; *see McDonnell Douglas*, 411 U.S. at 798. And in *Shell Oil*, the Court "*h[e]ld* that the existence of a charge that meets the requirements set forth in § 706(b),

42 U.S.C. § 2000e-5(b), is a jurisdictional prerequisite to judicial enforcement of a subpoena issued by the EEOC." 466 U.S. at 65 (emphasis added).

Respondent's other cases (at 24-25) are even less relevant. No one disputes that the conciliation requirement at issue in *Mach Mining* is non-jurisdictional: Title VII expressly permits suit even where the EEOC takes no action, and authorizes courts to stay actions to give the EEOC an opportunity to "obtain voluntary compliance." 42 U.S.C. § 2000e-5(f)(1); *see Mach Mining*, 135 S. Ct. at 1656. The statute's exhaustion provision is subject to no such exceptions. Meanwhile, in *Oscar Mayer* the Court held that a court could retain jurisdiction over an Age Discrimination in Employment Act (ADEA) action precisely because the plaintiff had "satisfied the requirements of 29 U.S.C. § 626(e)"—the ADEA's analogue to Title VII's charge-filing requirement. 441 U.S. at 765 n.13. If anything, that holding supports the view that the filing of such a charge is a jurisdictional prerequisite to suit.

III. TITLE VII'S PURPOSES ARE BEST SERVED BY A JURISDICTIONAL EXHAUSTION REQUIREMENT.

Congress's purposes in enacting Title VII support the conclusion that the exhaustion requirement is jurisdictional. Congress required exhaustion to promote the non-adversarial resolution of Title VII claims outside of court; to advance the EEOC's primary role in identifying and combatting employment discrimination; and to vindicate principles of federalism and sovereign immunity. Pet. Br. 27-32, 45-47. These "system-related goal[s]" are the hallmarks of a jurisdictional rule, *John R. Sand*, 552

U.S. at 133, and they would be thwarted if plaintiffs could proceed to court without first presenting a claim to the EEOC.

Respondent and the Government make hardly any attempt to dispute these statutory purposes.[1] Their first defense is simply to dismiss those purposes as irrelevant. But their sole support for that proposition is a footnote in *Reed Elsevier* stating that a statute should not be deemed jurisdictional "*merely* because it promotes important congressional objectives." Resp. Br. 28 (emphasis added) (quoting *Reed Elsevier*, 559 U.S. at 169 n.9); U.S. Br. 29 (same). The Court did not reject *any* consideration of congressional purposes, which is important to an accurate assessment of congressional intent. *See, e.g.*, *Gonzalez* v. *Thaler*, 565 U.S. 134, 144-145 (2012). (examining statutory purpose to determine whether requirement is jurisdictional).

Respondent also speculates that Congress's purposes would be "equally well-served by a mandatory claim-processing rule" because defendants have

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[1] Respondent (at 30 & n.7) and the Government (at 21-23) assert that Section 2000e-5(f)(1) does not properly implicate sovereign immunity because it affects only state and local governments. That is wrong twice over. First, states are of course entitled to sovereign immunity, and provisions waiving state sovereign immunity "must be strictly construed * * * in favor of the sovereign." *Sossamon* v. *Texas*, 563 U.S. 277, 292 (2011) (internal quotation marks omitted). Second, the statutory provision governing Title VII claims for federal employees expressly makes "section 2000e-5(f)" applicable to claims against the Federal Government, and dictates that claimants "may file a civil action as provided in section 2000e-5." 42 U.S.C. § 2000e-16(c), (d).

"every incentive" to raise exhaustion as an affirmative defense. Resp. Br. 28-29. But this Court does not assume that Congress relies on litigants to vindicate "system-related goal[s]." *John R. Sand*, 552 U.S. at 133. Jurisdictional limits are usually in a defendant's interests to invoke, but defendants sometimes fail to invoke them nonetheless—whether through inadvertence, disinterest, or strategic calculation. Courts therefore are responsible for policing compliance with such rules "despite a waiver." *Id.* at 134.

Respondent doubts that Title VII defendants would ever intentionally forgo raising an exhaustion defense. But defendants often prefer to obtain dismissal of a weak case on the merits, rather than for failure to exhaust: Among other reasons, a merits dismissal has *res judicata* effect, avoids giving the plaintiff an opportunity to alert the EEOC to the claim, and often prevents a plaintiff from pursuing related state-law claims in state court. Defendants are only more likely to try such a tactic in "[t]he New World" respondent advocates, "in which it is *certain* that" failure to exhaust "will not have jurisdictional consequences." *Gonzalez*, 565 U.S. at 158 n.1 (Scalia, J., dissenting).

In contrast, there is little merit to respondent's speculation that, if the exhaustion requirement is deemed jurisdictional, defendants will engage in "vexatious behavior" by waiting to raise exhaustion issues until losing on the merits. Resp. Br. 34. That concern is somewhat at odds with respondent's assertion that defendants have "every incentive" to raise exhaustion at the outset. *Id.* at 29. Furthermore, it assumes an implausible degree of inatten-

tion on behalf of courts and parties: If exhaustion is deemed a jurisdictional requirement, courts will consider it at the outset of a case, just as they consider other jurisdictional requirements like standing and diversity jurisdiction. Indeed, in *every* case cited in the petition for certiorari from circuits that deem exhaustion jurisdictional, exhaustion was raised at the earliest possible stage of the litigation; none involved the gamesmanship respondent fears. *See* Pet. 10-14.[2] Even here, petitioner did not raise exhaustion until remand only because that is when respondent amended her complaint to clarify, for the first time, that she was raising a standalone claim based on her firing, rather than presenting it as part of a course of retaliatory conduct. *Compare* J.A. 22-24, *with* J.A. 44-49.

Respondent also worries that petitioner's rule will require courts to resolve "complex or difficult exhaustion questions" instead of skipping to an easier merits ground for dismissal. Resp. Br. 33-34. But that is a *virtue* of petitioner's approach. Requiring courts to enforce the exhaustion requirement rather than dismissing a claim on the merits will ensure that plaintiffs have an opportunity to pursue their claims at the EEOC, potentially turning up helpful evidence and converting an easy merits dismissal into a plaintiff victory. Furthermore, the earlier the exhaustion issue is addressed, the more likely plaintiffs will be able to return to the EEOC within the statutory time limit for filing a charge.

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[2] These cases also suggest that plaintiffs regularly attempt to plead unexhausted claims, contrary to respondent's assertion. Resp. Br. 28-29.

In any event, respondent greatly exaggerates the difficulty of the exhaustion question. The statute sets out precisely what a plaintiff must do to exhaust: inform the EEOC of the "date, place and circumstances of the alleged unlawful employment practice" and wait until the EEOC resolves the claim or fails to act. 42 U.S.C. § 2000e-5(b), (f)(1). And in the rare borderline case involving difficult exhaustion questions that a defendant fails to brief, courts need not analyze the issue on its own. Resp. Br. 31, 33. They can order briefing on the question.

The straightforward exhaustion analysis makes plain that respondent did not exhaust her religious discrimination claim. Respondent acknowledges that she did not attempt to inform the EEOC of her religious-discrimination claim until "late summer or fall 2011." J.A. 71. Even if that attempt were considered successful, *but see* Pet. Br. 54-56, respondent sought her right-to-sue notice in November 2011, J.A. 98, and filed suit in January 2012, J.A. 16, before the 180-day period of exclusive agency jurisdiction expired. *See* 42 U.S.C. § 2000e-5(f)(1). Under the plain terms of Title VII, respondent failed to exhaust her claim, and the District Court lacked jurisdiction to consider it.

CONCLUSION

For the foregoing reasons, the Fifth Circuit's judgment should be reversed.

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No. 18-525

In the Supreme Court of the United States

FORT BEND COUNTY, TEXAS, PETITIONER

v.

LOIS M. DAVIS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the requirement in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.*, to file a charge with the Equal Employment Opportunity Commission is a jurisdictional prerequisite to suit that is immune to ordinary principles of forfeiture and waiver.

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In the Supreme Court of the United States

No. 18-525

FORT BEND COUNTY, TEXAS, PETITIONER

v.

LOIS M. DAVIS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether the requirement in Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. 2000e *et seq.*, to file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC or Commission) is a jurisdictional prerequisite to suit. The EEOC investigates charges of employment discrimination under Title VII and seeks to eliminate unlawful practices through informal methods. 42 U.S.C. 2000e-5(b). The EEOC and the Attorney General also have authority to bring civil actions against private employers and state and local governmental employers, respectively, for Title VII violations. 42 U.S.C. 2000e-5(f)(1). The United States has a substantial interest in the proper interpretation of Title VII.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-31a.

STATEMENT

1. Title VII prohibits discrimination in employment based on race, color, religion, sex, or national origin. 42 U.S.C. 2000e-2. It establishes a "detailed multi-step procedure" to enforce that prohibition. *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1649 (2015). The process "generally starts when 'a person claiming to be aggrieved' files a charge of an unlawful workplace practice with the EEOC," *ibid.* (citation omitted), which Congress charged with investigating and seeking to prevent discrimination, 42 U.S.C. 2000e-4(a), 2000e-5(a) and (b).

a. A Title VII charge "is not the equivalent of a complaint initiating a lawsuit." *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 68 (1984). A charge filed by an individual merely notifies the EEOC of the alleged discrimination, providing a starting point for the EEOC's investigation. *Ibid.* The statute prescribes only that "[c]harges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. 2000e-5(b). Pursuant to statutory rulemaking authority, 42 U.S.C. 2000e-12(a), the EEOC has further specified that a charge should contain "[a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices"; the employer's contact information; and a statement of whether the charging party has instituted proceedings with a state or local agency. 29 C.F.R. 1601.12(a). Nonetheless, a charge is adequate if it contains "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. 1601.12(b).

Section 2000e-5(e)(1) of Title VII provides that "[a] charge under this section shall be filed" with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e)(1). If the alleged discrimination occurred in a State or political subdivision that has its own agency with authority to grant or seek relief, Title VII instead directs the individual alleging discrimination to commence proceedings with that agency first. See 42 U.S.C. 2000e-5(c). If the state or local proceedings do not resolve the matter, the individual has "three hundred days after the alleged unlawful employment practice occurred," or 30 days after being notified that those proceedings have been "terminated"—"whichever is earlier"—to file a charge with the EEOC. 42 U.S.C. 2000e-5(e)(1). In practice, however, an individual typically need only file a single charge with either the EEOC or the state or local agency. Pursuant to EEOC regulations and worksharing agreements with state and local agencies, whichever entity receives the charge will also file it with the other. See 29 C.F.R. 1601.13(a)(3) and (b)(1); EEOC, *Fair Employment Practices Agencies (FEPAs) and Dual Filing*, https://www.eeoc.gov/employees/fepa.cfm; *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 112 (1988).[1]

Upon receiving a charge, the EEOC must notify the employer and investigate the allegations. 42 U.S.C. 2000e-5(b). The EEOC has broad discretion regarding

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[1] An individual typically may amend an existing charge in certain circumstances until the EEOC concludes its processes; the amendment relates back to the date of the original filing if it is related to or grows out of the subject matter of the original charge. See 29 C.F.R. 1601.12(b), 1601.19(a), 1601.28(a)(3); see also Donald R. Livingston & Reed L. Russell, *EEOC Litigation and Charge Resolution* 161 (2d ed. 2014).

the nature and extent of its investigation. See, *e.g.*, *EEOC* v. *Sterling Jewelers Inc.*, 801 F.3d 96, 98 (2d Cir. 2015), cert. denied, 137 S. Ct. 47 (2016). It also may obtain access to "any evidence of any person being investigated" that is "relevant to the charge under investigation." 42 U.S.C. 2000e-8(a).

b. Congress originally hoped employers would comply voluntarily with Title VII. *Shell Oil Co.*, 466 U.S. at 77. As first enacted, Title VII authorized the EEOC only to investigate charges and to engage in informal conciliation and persuasion. *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 358 (1977). If those efforts failed, the EEOC lacked enforcement authority. *Id.* at 358-359. Instead, the aggrieved person could file suit against the employer. Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, § 706(e), 78 Stat. 260. Because in 1964 the "umbrella provision for federal question jurisdiction," 28 U.S.C. 1331, included an amount-in-controversy requirement, Congress also enacted in Title VII a separate provision granting district courts jurisdiction over "'actions brought under this subchapter.'" *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 505-506 (2006) (quoting 42 U.S.C. 2000e-5(f)(3)); see § 706(f), 78 Stat. 260. The Attorney General could intervene in cases of general public importance and could bring his own suits challenging patterns or practices of discrimination. §§ 706(e), 707(a), 78 Stat. 260-261.

By 1972, however, Congress recognized that the "failure to grant the EEOC meaningful enforcement powers ha[d] proven to be a major flaw in the operation of Title VII." *General Tel. Co. of the Nw., Inc.* v. *EEOC*, 446 U.S. 318, 325 (1980) (*General Telephone*) (citation omitted). Accordingly, Congress amended Title VII to establish the current enforcement scheme. *Occidental*

Life Ins. Co., 432 U.S. at 359; see Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. The 1972 amendments preserved the EEOC's administrative role and retained the private right of action, but they also granted the EEOC authority to bring suit "to secure more effective enforcement of Title VII." *General Telephone*, 446 U.S. at 325; accord *Occidental Life Ins. Co.*, 432 U.S. at 368. The amendments did not alter Title VII's jurisdictional provision. Compare 42 U.S.C. 2000e-5(f)(3), with § 706(f), 78 Stat. 260.

As relevant here, Title VII currently provides that, if the EEOC finds "reasonable cause to believe that the charge is true," it must first "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b). If the EEOC is unable to secure a conciliation agreement it finds acceptable with a private employer named in a charge, the EEOC may sue the employer. 42 U.S.C. 2000e-5(f)(1). If the employer is a state or local government, the EEOC "shall refer the case to the Attorney General," who may bring a civil action. *Ibid.*[2]

If the EEOC does not find that the allegations have merit, it must dismiss the charge and notify the individual of her right to sue. 42 U.S.C. 2000e-5(b) and (f)(1). If the EEOC (or Attorney General for public employers) has neither brought suit nor reached a resolution within 180 days after the charge is filed, the individual is entitled to a right-to-sue notice upon request. 42 U.S.C. 2000e-5(f)(1); see 29 C.F.R. 1601.28(a)(2) (EEOC may

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[2] Title VII also prohibits employment discrimination by the federal government. 42 U.S.C. 2000e-16(a). A separate procedural regime, not at issue here, governs the processing and adjudication of claims by federal employees. 42 U.S.C. 2000e-16(b)-(f).

issue right-to-sue letter sooner if it certifies that it cannot complete investigation in 180 days).

2. a. In 2007, petitioner hired respondent as a supervisor in its information-technology department. Pet. App. 17a n.2. In 2010, respondent filed a complaint with petitioner's human-resources department alleging that another employee had sexually harassed and assaulted her. *Ibid.* Petitioner placed respondent on leave while it investigated her complaint. *Ibid.* According to respondent, when she returned from leave the following month, her new supervisor began retaliating against her by reducing and changing her workload. *Ibid.*; J.A. 77-78, 80.

In February 2011, respondent submitted an intake questionnaire alleging employment discrimination to the Texas Workforce Commission (State Commission), which has a worksharing agreement with the EEOC. Pet. App. 19a; J.A. 73-74. The following month, respondent filed a formal charge with the State Commission, which treated that charge as filed with the EEOC on the date respondent submitted the intake questionnaire. J.A. 80. Respondent's charge stated that "[she] believe[d] [she] ha[d] been discriminated against * * * because of [her] gender/sex, female, and in retaliation for [her] complaint of harassment." *Ibid.* She also checked boxes indicating that she was complaining of discrimination based on "Sex" and "Retaliation." *Ibid.* (capitalization altered).

b. In March 2011, petitioner requested that all information-technology employees report to work one weekend in July. Pet. App. 18a n.2. Respondent informed her supervisor she could not work that Sunday due to a religious commitment at her church, and she arranged for a replacement. *Id.* at 18a n.2, 19a. Her supervisor refused to approve her absence. *Ibid.* Respondent

attended the church event instead of coming to work, and petitioner terminated her employment. *Ibid.*

Respondent then sought to amend her pending charge by modifying her intake questionnaire. Pet. App. 19a-20a; see J.A. 71. In the field labeled "Employment Harms or Actions," she checked boxes for "Discharge" and "Reasonable Accommodations," and near the box labeled "Other" she handwrote "Religion." J.A. 101; cf. J.A. 74.[3] The State Commission later notified respondent that it had decided to dismiss her charge because "it cannot be established that the employer has discriminated against you based on Sex, Retaliation, or any other reason prohibited by the laws we enforce." J.A. 92. In December 2011, the Department of Justice issued respondent a right-to-sue letter. *Id.* at 105-106; Pet. App. 21a.

3. In 2012, respondent brought this suit against petitioner, alleging (as relevant) retaliation and religious discrimination under Title VII. Pet. App. 2a, 16a. The district court granted summary judgment for petitioner. *Id.* at 2a-3a. The court of appeals affirmed on the retaliation claim but reversed and remanded on the religious-discrimination claim. *Id.* at 3a. This Court denied certiorari. 135 S. Ct. 2804.

On remand, respondent amended her complaint to allege only religious discrimination. Pet. App. 17a-19a. Petitioner moved to dismiss for lack of jurisdiction, arguing for the first time that respondent had failed to include a claim for religious discrimination in her charge. *Id.* at 21a-22a. The district court dismissed the suit for lack of jurisdiction, concluding that the charge-filing requirement is jurisdictional and nonwaivable. *Id.* at 24a-38a.

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[3] The court of appeals reserved judgment on whether respondent successfully amended her charge to allege religious discrimination. Pet. App. 15a n.5. The United States takes no position on that issue.

4. The court of appeals again reversed. Pet. App. 1a-15a. It first concluded that the charge-filing requirement is not jurisdictional, relying on circuit precedent. *Id.* at 6a-9a. The court further explained that this Court's precedent supported that conclusion. *Id.* at 9a-12a. In *Arbaugh*, the court of appeals observed, this Court "articulated a 'readily administrable bright line'" rule, under which "'a threshold limitation'" is "'jurisdictional'" only "'[i]f the Legislature clearly states that'" it is. *Id.* at 9a-10a (quoting *Arbaugh*, 546 U.S. at 515-516). Applying that test, the court of appeals concluded that "Congress did not suggest—much less clearly state—that Title VII's administrative exhaustion requirement is jurisdictional." *Id.* at 10a.

The court of appeals concluded that failure to comply with Title VII's charge-filing requirement is an affirmative defense. Pet. App. 14a. In this case, the court found it "abundantly clear that [petitioner] ha[d] forfeited its opportunity to assert" that defense by "wait[ing] five years and an entire round of appeals all the way to the Supreme Court" before raising it. *Id.* at 14a-15a.[4]

SUMMARY OF ARGUMENT

Title VII's charge-filing requirement is a nonjurisdictional prerequisite subject to forfeiture and waiver.

A. In recent years, this Court has sharpened the distinction between jurisdictional requirements that limit federal courts' adjudicatory power and nonjurisdictional rules that merely prescribe requirements for relief or procedures for processing claims. The Court has adopted a "readily administrable bright line" test: a requirement is

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[4] Judge Jones concurred in the judgment, Pet. App. 1a n.*, but did not issue a separate opinion.

"jurisdictional" only if Congress "clearly states" that it is. *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 515-516 (2006).

Straightforward application of *Arbaugh*'s bright-line test shows that Title VII's charge-filing requirement is not jurisdictional. Neither Title VII's provision that imposes the charge-filing requirement, 42 U.S.C. 2000e-5(e)(1), nor the provision making it a precondition to filing suit, 42 U.S.C. 2000e-5(f)(1), "speak[s] in jurisdictional terms." *Arbaugh*, 546 U.S. at 515 (citation omitted). Congress established jurisdiction over Title VII suits in two other, separate provisions; neither makes jurisdiction contingent on filing a charge with the EEOC. This Court's precedent powerfully confirms that conclusion. The Court held in *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), that the requirement to file a *timely* charge before bringing suit is not jurisdictional for reasons that apply equally to the requirement to file a charge at all. Subsequent decisions addressing other analogous requirements reinforce that conclusion.

B. Petitioner errs in contending (Br. 15-40) that the clear-statement rule is inapplicable here because the charge-filing requirement is an "exhaustion" requirement. The language and logic of this Court's decisions leave no doubt that the clear-statement rule applies to exhaustion requirements. In any event, Title VII's requirement to file a charge with the EEOC is not "in any sense an exhaustion provision." *Woodford* v. *Ngo*, 548 U.S. 81, 98 (2006). The EEOC does not render decisions on charges that courts review. Petitioner's reliance on cases addressing whether Congress intended a process of administrative adjudication and judicial review to be exclusive is therefore misplaced. Cf., *e.g.*, *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994). Congress did not channel Title VII claims to the EEOC for adjudication. It merely directed

individuals alleging employment discrimination to give the EEOC a right of first refusal before bringing suit.

C. Petitioner also errs in contending that the charge-filing requirement must be deemed jurisdictional because it advances important statutory purposes. The Court has held that a requirement is not "jurisdictional merely because it promotes important congressional objectives." *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 169 n.9 (2010). In any event, treating the charge-filing requirement as jurisdictional is unnecessary to further Congress's aims. Defendants can and do seek dismissal for failure to file a charge, giving plaintiffs a powerful incentive to comply. And the costs of deeming the charge-filing requirement jurisdictional—including burdens imposed on courts and unfair outcomes for blindsided private litigants—outweigh any benefits.

ARGUMENT

TITLE VII'S CHARGE-FILING REQUIREMENT IS NOT A JURISDICTIONAL PREREQUISITE TO SUIT

Under the "bright line" rule the Court has articulated, a requirement is jurisdictional only if Congress "clearly states" that it is. *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 515-516 (2006). That clear-statement rule resolves this case. Congress conferred jurisdiction over Title VII suits in 28 U.S.C. 1331 and 42 U.S.C. 2000e-5(f)(3). Nothing in Title VII's text or context clearly indicates that failure to comply with Title VII's charge-filing requirement divests federal courts of that jurisdiction.

Unable to satisfy the clear-statement rule, petitioner urges the Court to depart from it. Petitioner spends the bulk of its brief (Br. 15-40) inviting the Court to make an exception to *Arbaugh*'s bright-line rule for "exhaustion" requirements, Pet. Br. 15, invoking cases that addressed statutes that channeled particular claims to

an exclusive avenue of administrative and judicial review. This Court's clear-statement cases, however, foreclose petitioner's proposed carve-out. In any event, Title VII's charge-filing requirement is not an exhaustion requirement, and Title VII does not resemble statutes that require presenting a claim to an agency for a decision before seeking judicial review of that decision. Petitioner's alternative contention (Br. 27-32, 45-47) that the charge-filing requirement serves purposes that are too weighty to be waivable is also, at bottom, an invitation to make an ad hoc exception to the Court's categorical clear-statement test. The Court should reject petitioner's invitations to blur *Arbaugh*'s bright-line rule.

A. Under This Court's Clear-Statement Rule, Title VII's Charge-Filing Requirement Is Not Jurisdictional Because Congress Did Not Clearly State Otherwise

1. A prerequisite to relief is not jurisdictional unless Congress clearly states that it is

a. "Characterizing a rule as jurisdictional renders it unique in our adversarial system" and carries significant consequences. *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013) (*Auburn*). A jurisdictional defect "can be raised at any time, even by a party that once conceded the tribunal's subject-matter jurisdiction," in turn causing a "waste of adjudicatory resources" and "disturbingly disarm[ing] litigants." *Ibid.* And such a defect must be raised by courts *sua sponte*, even on appeal. *Arbaugh*, 546 U.S. at 515. Confusion about the meaning of "jurisdiction" exacerbates those consequences. "'Jurisdiction,' this Court has observed, 'is a word of many, too many, meanings.'" *Id.* at 510 (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 90 (1998)). Courts "ha[ve] sometimes been profligate in [their] use of the

term" and historically were "less than meticulous" in distinguishing jurisdictional limits from other prerequisites to relief. *Id.* at 510-511.

"This Court has endeavored in recent years to 'bring some discipline' to the use of the term 'jurisdictional'" by "press[ing] a stricter distinction between truly jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim-processing rules,' which do not." *Gonzalez* v. *Thaler*, 565 U.S. 134, 141 (2012) (citations omitted). In *Arbaugh*, it adopted a "readily administrable bright line" test, 546 U.S. at 516, which it has repeatedly reaffirmed: "A rule is jurisdictional 'if the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional.'" *Hamer* v. *Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 20 n.9 (2017) (quoting *Gonzalez*, 565 U.S. at 141, in turn quoting *Arbaugh*, 546 U.S. at 515) (brackets omitted).

Congress need not "incant magic words" to supply a clear statement. *United States* v. *Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) (citation omitted). As in construing any statute, courts should consider the "[s]tatutory context," *id.* at 1633, "including this Court's interpretation of similar provisions in many years past," *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 168 (2010); see *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133-139 (2008); *Bowles* v. *Russell*, 551 U.S. 205, 208-215 (2007). But "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences." *Wong*, 135 S. Ct. at 1632. The Court has thus aptly labeled *Arbaugh*'s test a "clear-statement rule." *Hamer*, 138 S. Ct. at 20 n.9; accord *Wong*, 135 S. Ct. at 1632; *Gonzalez*, 565 U.S. at 142.

Many of the Court's cases applying the clear-statement rule have addressed time limits for pursuing administrative or judicial relief. *E.g.*, *Wong*, 135 S. Ct. at 1631-1633; *Auburn*, 568 U.S. at 153-155; *Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011). In that setting, it is especially "clear and easy to apply: If a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional; otherwise, the time specification fits within the claim-processing category." *Hamer*, 138 S. Ct. at 20 (citation omitted). But *Arbaugh*'s "clear-statement rule" applies equally "[i]n cases not involving the timebound transfer of adjudicatory authority from one Article III court to another." *Id.* at 20 n.9. The Court has applied it to (and found nonjurisdictional) Title VII's provision limiting its coverage to employers with at least 15 employees, *Arbaugh*, 546 U.S. at 510-516; the requirement to register a copyright (or be refused registration) before suing for infringement, *Reed Elsevier*, 559 U.S. at 160-169 (addressing 17 U.S.C. 411(a)); the requirement that only objections to an Environmental Protection Agency clean-air regulation "raised with reasonable specificity" during the rulemaking may be asserted in litigation, *EPA* v. *EME Homer City Generation, L.P.*, 572 U.S. 489, 511-512 (2014) (citation omitted); the requirement that parties to certain railroad labor disputes "attempt settlement 'in conference'" before arbitrating, *Union Pac. R.R.* v. *Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, 81-85 (2009) (*Union Pacific*); and the requirement that a certificate of appealability in habeas proceedings specify the issue on which the court finds a substantial showing of the denial of a constitutional right, *Gonzalez*, 565 U.S. at 140-145. The test

also applies regardless of whether a requirement is "considered an element of" the plaintiff's "claim" or instead a "prerequisite to initiating a lawsuit." *Reed Elsevier*, 559 U.S. at 165-166.

b. Concluding that a requirement is nonjurisdictional means that, like most other requirements or defenses, it "can be waived or forfeited by an opposing party." *Nutraceutical Corp.* v. *Lambert*, 139 S. Ct. 710, 714 (2019); see *Kontrick* v. *Ryan*, 540 U.S. 443, 456 (2004). And because nonjurisdictional requirements do not implicate courts' authority, courts "are under no *obligation* to raise" a nonjurisdictional issue *sua sponte*. *Day* v. *McDonough*, 547 U.S. 198, 205 (2006); cf. *Arbaugh*, 546 U.S. at 514.

Deeming a requirement nonjurisdictional, however, "does not render it malleable in every respect." *Nutraceutical*, 139 S. Ct. at 714. Although this case does not present the question, some nonjurisdictional requirements are subject to exceptions even when timely asserted—such as equitable tolling of limitations periods—while others are "'mandatory,'" *i.e.*, "'unalterable' if properly raised by an opposing party." *Ibid.* (citation omitted); see *id.* at 714-715 (deadline for appealing class certification is nonjurisdictional but mandatory and immune to equitable tolling); *Hallstrom* v. *Tillamook Cnty.*, 493 U.S. 20, 25-31 (1989) (requirement to give notice to certain entities before suing was mandatory, regardless of whether it was jurisdictional). Moreover, although federal courts are "not obliged" to address mandatory but nonjurisdictional defects on their own initiative when the parties do not raise them, they may have discretion to do so. *Day*, 547 U.S. at 209 ("[D]istrict courts are permitted, but not obliged, to

consider, *sua sponte*, the timeliness of a state prisoner's habeas petition.").

2. Title VII's text and context do not clearly indicate that the charge-filing requirement is jurisdictional

a. Straightforward application of *Arbaugh*'s bright-line rule demonstrates that Title VII's charge-filing requirement is not a jurisdictional prerequisite to suits brought under 42 U.S.C. 2000e-5(f)(1), and therefore is subject to ordinary principles of forfeiture and waiver. Title VII's text contains no "clear statement" that the requirement limits subject-matter jurisdiction. *Wong*, 135 S. Ct. 1632. The provision that requires filing a charge (and sets the deadline) "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 1633 (quoting *Arbaugh*, 546 U.S. at 515). That provision, 42 U.S.C. 2000e-5(e)(1), states in relevant part: "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred," or within 300 days if the individual first sought relief from a state or local agency. *Ibid.* That text and the rest of the provision address only proceedings before the EEOC, not the scope of courts' adjudicatory authority.

Likewise, the provision on which petitioner focuses, 42 U.S.C. 2000e-5(f)(1), says nothing about the "power of the court" to decide Title VII claims, but addresses only the "rights or obligations of the parties." *Reed Elsevier*, 559 U.S. at 161 (citations omitted). Section 2000e-5(f)(1) provides (with irrelevant exceptions) that, "[i]f within thirty days after a charge is filed with the Commission * * * , the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent" other than

state or local governments. 42 U.S.C. 2000e-5(f)(1). It similarly authorizes the Attorney General to sue if the defendant is a state or local government. *Ibid.* It further provides that, "[i]f a charge filed with the Commission * * * is dismissed by the Commission"—or if, within a specified period, neither the EEOC nor the Attorney General has filed suit—"a civil action may be brought against the respondent named in the charge * * * by the person claiming to be aggrieved." *Ibid.*

Section 2000e-5(f)(1)'s text thus addresses who has a cause of action to sue for a Title VII violation, and against whom. See *Thompson* v. *North Am. Stainless, LP*, 562 U.S. 170, 175-176 (2011). "[A] question whether Congress intended to allow a certain cause of action against" a particular defendant "is not a question of jurisdiction"; it is a merits issue. *Air Courier Conference of Am.* v. *American Postal Workers Union, AFL-CIO*, 498 U.S. 517, 523 n.3 (1991); accord *Steel Co.*, 523 U.S. at 92. Section 2000e-5(f)(1) answers the question whether Congress "inten[ded] to create not just a private right but also a private remedy," *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001)—not the distinct question whether a court has the power to "proceed at all," *Steel Co.*, 523 U.S. at 94 (citation omitted).

Title VII's text contrasts sharply with the text of requirements that have satisfied the clear-statement test. In *Rockwell International Corp.* v. *United States*, 549 U.S. 457 (2007), the Court addressed the provision of the False Claims Act, 31 U.S.C. 3729 *et seq.*, withdrawing jurisdiction over claims based on public disclosures. 549 U.S. at 467-470. The Act provided that "[n]o court shall have jurisdiction over an action" by a private plaintiff "based upon the public disclosure of allegations or transactions" in certain contexts "unless" the plaintiff

"is an original source." 31 U.S.C. 3730(e)(4)(A) (2006). The Court held that "the jurisdictional nature of the original-source requirement is clear *ex visceribus verborum*." *Rockwell Int'l*, 549 U.S. at 468. And in *Patchak* v. *Zinke*, 138 S. Ct. 897 (2018), the plurality concluded Congress had "use[d] jurisdictional language" by "stat-[ing] that an 'action' relating to" certain property "'shall not be filed or maintained in a Federal court and shall be promptly dismissed.'" *Id.* at 904-905 (opinion of Thomas, J.) (citation omitted). Title VII's provisions at issue here bear no resemblance to those statutes. They neither refer to the authority of courts nor mandate dismissal of actions.

Moreover, the charge-filing requirement itself is a paradigmatic claim-processing rule. It requires individuals alleging discrimination by a private, state-government, or local-government employer to submit information to an agency and then wait a specified period before bringing suit unless the agency itself sues. That is a quintessential requirement for the processing of claims. Cf. *Patchak*, 138 S. Ct. at 906 (plurality opinion) (listing "filing deadline[s]" and "exhaustion requirement[s]" compelling parties to "'take certain procedural steps at certain specified times'" as classic "'claim-processing rule[s]'" (citation omitted)).

b. Statutory context confirms this conclusion. Congress conferred federal-court jurisdiction over Title VII suits in two other, separate provisions. First, 28 U.S.C. 1331 "gives federal courts subject-matter jurisdiction over all civil actions 'arising under' the laws of the United States," and "Title VII actions fit that description." *Arbaugh*, 546 U.S. at 503 (citation omitted). Second, Congress included an additional grant of jurisdic-

tion when it enacted Title VII because, in 1964, "[Section] 1331's umbrella provision for federal-question jurisdiction contained an amount-in-controversy limitation" that might "impede an employment-discrimination complainant's access to a federal forum." *Id.* at 505. That provision, codified at 42 U.S.C. 2000e-5(f)(3), provides: "Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter." *Ibid.* It then addresses venue for such suits. *Ibid.* Since the elimination of Section 1331's amount-in-controversy requirement, Section 2000e-5(f)(3) "has served simply to underscore Congress' intention to provide a federal forum for the adjudication of Title VII claims." *Arbaugh*, 546 U.S. at 506.

Neither Section 1331 nor Section 2000e-5(f)(3) makes jurisdiction turn on whether Title VII's charge-filing requirement has been satisfied. Neither "specifies any threshold ingredient akin to 28 U.S.C. § 1332's monetary floor." *Arbaugh*, 546 U.S. at 515. Although Section 2000e-5(f)(3) confers jurisdiction only over "actions *brought under* [Title VII]," 42 U.S.C. 2000e-5(f)(3) (emphasis added), that limitation is best understood—like Section 1331's "arising under" requirement—to require that a complaint assert a "colorable" Title VII claim that is not "'wholly insubstantial and frivolous.'" *Arbaugh*, 546 U.S. at 513 n.10 (quoting *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946)) (addressing Section 1331); see *Steel Co.*, 523 U.S. at 89. Moreover, as this Court has repeatedly held in construing Title VII and other statutes, the fact that Congress addressed jurisdiction in "an entirely separate provision" confirms Section 2000e-5(e)(1) and (f)(1) are *not* jurisdictional. *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982); see

Arbaugh, 546 U.S. at 515; *Wong*, 135 S. Ct. at 1633; *Reed Elsevier*, 559 U.S. at 164-165.

c. "[C]ontext" also "includ[es] this Court's interpretations of similar provisions in many years past," which can be "probative of Congress' intent." *Hamer*, 138 S. Ct. at 20 n.9 (brackets and citation omitted). This Court's precedent powerfully reinforces the most natural reading of the statute. Long before *Arbaugh*, this Court held in *Zipes* that Title VII's requirement to "fil[e] a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court" for reasons that apply equally to the charge-filing requirement itself. 455 U.S. at 393-394; see *id.* at 393-398.

In *Zipes*, the Court reasoned that "[t]he provision specifying the time for filing charges with the EEOC," Section 2000e-5(e)(1), "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." 455 U.S. at 394; see *id.* at 394 n.10. The Court also explained that the provision requiring a timely charge is "entirely separate" from "[t]he provision granting district courts jurisdiction under Title VII," Section 2000e-5(f)(3), which "does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC." *Id.* at 393-394; see *id.* at 393 n.9. The same is equally true of the requirement to file a charge, which appears in the same provision.

Zipes further reasoned that *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), foreclose deeming the timely-charge requirement jurisdictional. See *Zipes*, 455 U.S. at 396-397. In *Albemarle Paper*, the Court "reject[ed] th[e] contention" that unnamed members of a Title VII plaintiff class "who ha[d] not themselves filed charges with the EEOC" could not receive

backpay. 422 U.S. at 414 n.8. In *Franks*, it again "reject[ed]" the argument that unnamed class members who "had not filed administrative charges under the provisions of Title VII with the [EEOC]" could not obtain seniority relief. 424 U.S. at 771. "If the timely-filing requirement were to limit the jurisdiction of the District Court to those claimants who have filed timely charges with the EEOC," *Zipes* held, the courts "would have been without jurisdiction to adjudicate the claims of those who had not filed as well as without jurisdiction to award them" relief. 455 U.S. at 397. So too here, the necessary implication of *Franks* and *Albemarle Paper* is that the failure to file a charge at all does not divest a court of jurisdiction.

Moreover, as *Zipes* explained, in both *Franks* and *Albemarle Paper* the Court recognized that "Congress had approved the Court of Appeals cases that awarded relief to class members who had not exhausted administrative remedies before the EEOC." 455 U.S. at 397. "[I]n doing so," *Zipes* concluded, "Congress necessarily adopted the view that the provision for filing charges with the EEOC should not be construed to erect a jurisdictional prerequisite to suit." *Ibid.*; see *Franks*, 424 U.S. at 771; *Albemarle Paper*, 422 U.S. at 414 n.8. Petitioner dismisses (Br. 48-49) *Franks* and *Albemarle Paper* as confined to the class-action context. But this Court in *Zipes* rejected that crabbed reading of those decisions by concluding that their logic shows the timely-charge requirement itself is nonjurisdictional. See 455 U.S. at 397.

Petitioner cites two earlier cases that purportedly "held that the filing of 'charges of employment discrimination with the Commission' is one of 'the jurisdictional prerequisites to a federal action.'" Pet. Br. 48 (quoting *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798

(1973), and citing *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974)). But *Zipes* dismissed those and other "scattered references to the timely-filing requirement as jurisdictional" because "the legal character of the requirement was not at issue in those cases," and later cases had not used the same label. 455 U.S. at 395; see *id.* at 395 n.12. Those dicta are at most "'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit." *Arbaugh*, 546 U.S. at 511 (quoting *Steel Co.*, 523 U.S. at 91).

Beyond the Title VII context, the Court has held that analogous requirements are not jurisdictional for reasons similar to those applicable here. For example, in *Reed Elsevier*, the Court held that the requirement that a person must obtain (or seek and be refused) registration of a copyright from a federal agency before suing for infringement is not jurisdictional. 559 U.S. at 160-169. The Court noted that it had previously treated as nonjurisdictional "other types of threshold requirements that claimants must complete, or exhaust, before filing a lawsuit," such as the administrative exhaustion requirement of 42 U.S.C. 1997e(a) for certain suits by prisoners. 559 U.S. at 166; see *id.* at 166 n.6 (citing *Jones* v. *Bock*, 549 U.S. 199, 211 (2007), and *Woodford* v. *Ngo*, 548 U.S. 81, 93 (2006)); *EME Homer City*, 572 U.S. at 511-512 (applying *Arbaugh* to requirement to raise objection to regulation with "reasonable specificity" during rulemaking); *Union Pacific*, 558 U.S. at 80-85 (applying *Arbaugh* to hold nonjurisdictional a statutory requirement that parties to railway-labor disputes attempt to "conferenc[e]" certain disputes before arbitrating).

d. Petitioner and its amici suggest that Title VII's charge-filing requirement is jurisdictional because it

conditions a waiver of state sovereign immunity. Pet. Br. 46; NCSL Amicus Br. 22-29. That contention lacks merit. To be sure, Congress's decision to condition a waiver of *federal* sovereign immunity on satisfying a particular requirement may warrant deeming it jurisdictional. Cf. *United States* v. *Dalm*, 494 U.S. 596, 608-610 (1990). But Section 2000e-5(e)(1) and (f)(1) do not apply to suits against the federal government. Although Section 2000e-5(e)(1) and (f)(1) apply to suits against States—as well as nonimmune private and local-government defendants—the fact that a State could face liability under those general provisions cannot justify deeming the charge-filing requirement jurisdictional. Otherwise, any prerequisite to a Title VII suit applicable to actions against States and other defendants alike—including the timely-charge and employee-numerosity requirements—would presumably be jurisdictional. That cannot be squared with this Court's decisions in *Zipes* and *Arbaugh*.

In contrast, sovereign-immunity considerations are relevant to a separate provision of Title VII (not at issue here) that addresses claims of employment discrimination by federal-government employers. See 42 U.S.C. 2000e-16. Section 2000e-16 establishes a distinct procedure for the adjudication of such claims. "[C]omplaint[s] of discrimination" are first presented to the employing agency, and the agency's action may then be appealed to the EEOC; an employee or applicant who is "aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5." 42 U.S.C. 2000e-16(c). As petitioner noted at the petition stage, although the EEOC has long maintained that Section 2000e-5's charge-filing requirement is not jurisdictional in suits

against private or state or local government employers, Pet. 19 & n.6, the government has argued that the failure of a person alleging employment discrimination by the federal government to file a complaint in compliance with Section 2000e-16 is a jurisdictional bar, Pet. 18 & n.5.

Sections 2000e-5 and 2000e-16 differ in significant respects, including that Section 2000e-16 implicates federal sovereign immunity in every application, and that it authorizes suits only by a person "aggrieved by the final disposition of his complaint," which presupposes that a complaint was filed and "dispos[ed] of" by the EEOC, 42 U.S.C. 2000e-16(c). In light of those differences, and because Section 2000e-16 does not apply here, this case provides no occasion to address whether Section 2000e-16(c)'s charge-filing requirement is jurisdictional or otherwise nonwaivable. But if the Court were to conclude in an appropriate case that the differences between Sections 2000e-5 and 2000e-16 are insufficient to warrant classifying them differently, it should conclude that neither is jurisdictional.

B. Petitioner's Contention That Title VII's Charge-Filing Requirement Is An "Exhaustion" Rule Exempt From The Clear-Statement Rule Lacks Merit

Petitioner cannot show that Title VII contains the requisite clear statement that the charge-filing requirement is jurisdictional. Petitioner accordingly devotes most of its argument to urging an exception to *Arbaugh*'s bright-line rule for "exhaustion" requirements—*i.e.*, requirements to present claims to, or exhaust remedies before, an agency. Pet. Br. 40. Petitioner attempts to ground that exception in this Court's cases addressing statutory schemes that channel review of particular claims through an exclusive process of administrative and judicial review. In those regimes, petitioner argues, the

provisions precluding review by other means "[t]ypically" *are* jurisdictional. Pet. Br. 18 (emphasis omitted).

That contention lacks merit. There is no exception to *Arbaugh* for exhaustion requirements. Congress of course can make an exhaustion requirement jurisdictional, and this Court has held that Congress has done so in certain statutes. See, *e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319, 328 (1976). But petitioner identifies no basis for exempting such requirements from *Arbaugh*'s rule. In any event, Title VII's charge-filing requirement is not an exhaustion requirement, and the Court's cases addressing channeling review to an exclusive process are inapposite.

1. In *Arbaugh* and later cases, the Court stated the clear-statement rule in categorical terms, with no suggestion that a broad subset of requirements is exempt. See *Arbaugh*, 546 U.S. at 515-516; pp. 12-14, *supra*. The Court has explained that *Arbaugh*'s "clear statement rule" applies across the board—governing "time bars," *Wong*, 135 S. Ct. at 1632, and other requirements alike, see *Hamer*, 138 S. Ct. at 20 n.9 ("clear-statement rule" extends to "cases not involving the timebound transfer of adjudicatory authority from one Article III court to another"). The Court has in fact applied *Arbaugh*'s rule to requirements to present matters to agencies prior to litigating in a particular forum. See *EME Homer City*, 572 U.S. at 511-512; *Reed Elsevier*, 559 U.S. at 160-169; cf. *Union Pacific*, 558 U.S. at 81-85. And it has held that even an explicit statutory requirement to "'exhaust[]'" claims before administrative adjudicators is not "jurisdictional," *Ngo*, 548 U.S. at 88, 93 (quoting 42 U.S.C. 1997e(a)), and instead is an affirmative defense, *Jones*, 549 U.S. at 211-217; see *Patchak*, 138 S. Ct. at 906 (plurality opinion).

Adopting an exception to *Arbaugh*'s rule for exhaustion requirements also would undermine the rule's central purpose. Injecting a threshold, '*Arbaugh* Step Zero' inquiry would blur the "readily administrable bright line" *Arbaugh* drew and reintroduce some of the uncertainty and confusion that the clear-statement rule eliminates. 546 U.S. at 516. And it would defeat the Court's goal of "leav[ing] the ball in Congress' court," which requires providing clear background rules against which Congress can legislate. *Id.* at 515.

To be sure, "Congress could make" exhaustion requirements jurisdictional, "just as it has made an amount-in-controversy threshold an ingredient of subject-matter jurisdiction" in 28 U.S.C. 1332. *Arbaugh*, 546 U.S. at 514-515; see *id.* at 515 n.11 (listing examples of statutes that make particular requirements jurisdictional). And this Court has held that some requirements to present claims to agencies are jurisdictional in character. In *Eldridge*, it concluded that the statutory requirement to present a Social Security claim first to the agency is a "'jurisdictional'" and "nonwaivable" prerequisite to judicial review under 42 U.S.C. 405(g), reasoning that "[a]bsent such a claim there can be no 'decision'" that a court can review. 424 U.S. at 328; cf. 42 U.S.C. 2000e-16(c) (permitting Title VII suit by federal employee "aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint," which presupposes that complaint was filed and disposed of). That conclusion is reinforced in the Social Security context by the fact that 42 U.S.C. 405(h) expressly bars jurisdiction under any other statute, including 28 U.S.C. 1331, to review Social Security determinations, which necessarily means 42 U.S.C. 405(g) provides the only avenue to court. But precisely

because Congress can make an exhaustion requirement jurisdictional if it wishes, there is no sound basis for exempting such requirements from the ordinary rule.

2. In any event, petitioner's argument fails on its own terms because Title VII's charge-filing requirement is not "in any sense an exhaustion provision." *Ngo*, 548 U.S. at 98 (rejecting analogy between exhaustion requirement of 42 U.S.C. 1997e(a) for certain suits by prisoners and Title VII's charge-filing requirement). Unlike the statutory schemes in the cases petitioner cites (Br. 18-23)—in which a claimant must submit a claim to an agency, which then renders a decision that is subject to judicial review—Title VII does not empower the EEOC to issue decisions adjudicating claims and awarding relief that courts then review. The statute directs the EEOC to investigate allegations of discrimination, to determine whether reasonable cause exists to believe that the allegations are true, and to attempt to conciliate disputes. 42 U.S.C. 2000e-5(b) and (f)(1). If those efforts fail, the EEOC cannot issue a self-executing ruling that parties must obey unless it is overturned by a court.

Instead, if the EEOC believes a claim is meritorious, it must seek judicial relief. And if a suit is brought—whether by the EEOC, the Attorney General, or a private party—the court does not review the EEOC's action; it considers the claim of employment discrimination de novo. See *Chandler* v. *Roudebush*, 425 U.S. 840, 844-845 (1976). Moreover, a private suit can proceed even if the EEOC does not act at all. An individual alleging discrimination is entitled to sue 180 days after filing a charge even if the EEOC's investigation is ongoing. 42 U.S.C. 2000e-5(f)(1).

The Title VII regime thus does not resemble the "statutory scheme[s] of administrative and judicial review" petitioner surveys (Br. 20), in which Congress has channeled review of certain claims to agencies and restricted judicial review accordingly. See Pet. Br. 18-23. Instead, individuals alleging discrimination merely must give the EEOC a right of first refusal before bringing their own suits. This Court's cases addressing whether it is "'fairly discernible'" that Congress intended a particular avenue of administrative adjudication and judicial review to be "exclusive[]" are therefore inapposite. *Elgin* v. *Department of the Treasury*, 567 U.S. 1, 10 (2012); see *id.* at 8-15; *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207-216 (1994). Congress did not channel Title VII claims to the EEOC for adjudication; it left the adjudication of such claims to federal courts. Respondent is not seeking to bypass an exclusive avenue for adjudicating claims by litigating in a forum different than the one Congress specified. She brought suit in district court, as Title VII directs. The question is whether a failure to comply with a particular prerequisite to seeking review in that forum has jurisdictional consequences.

The charge-filing requirement also does not implicate many of the same concerns that underlie typical exhaustion requirements. It does not guard against usurpation of "administrative agency authority" to decide disputes or to "correct [an agency's] own mistakes." *Ngo*, 548 U.S. at 89 (citation omitted). Nor does it "produce a useful record for subsequent judicial consideration." *Ibid.* (citation omitted). Courts in Title VII suits do not sit in review of the EEOC's reasonable-cause determinations. They simply decide the plaintiff's claims.

3. Even if petitioner could establish that exhaustion requirements are exempt from *Arbaugh* and that the requirement to file a charge is an exhaustion requirement, that still would not support petitioner's position here. Respondent undisputedly filed a charge with the EEOC. Petitioner's contention (Br. 54-56) is that respondent's charge was inadequate because it omitted the specific allegation (of religious discrimination) on which respondent is now pursuing relief in court. Because petitioner "forfeited" any defense that respondent failed to satisfy the charge-filing requirement, Pet. App. 15a, petitioner must show that Congress stripped federal-court jurisdiction over any particular allegation not included in an otherwise-proper charge.

Petitioner has not made that showing. Indeed, where a statute does not expressly preclude consideration by a court of matters not presented in a particular way to an agency, courts are reluctant to read in an "issue exhaustion" requirement unless the agency proceedings are "adversarial" in nature. *Sims* v. *Apfel*, 530 U.S. 103, 110 (2000); see *id.* at 107-110. Courts should be all the more reluctant to read in a *jurisdictional* issue-exhaustion rule where Congress has not imposed one. It is thus very unlikely that Congress intended the omission of particular allegations in an EEOC charge to have jurisdictional consequences. Proceedings before the EEOC are not adversarial. Moreover, whatever specific allegations a charge makes, the EEOC conducts its own investigation and may bring suit challenging any violations it discovers in the course of a reasonable investigation. See *General Tel. Co. of the Nw., Inc.* v. *EEOC*, 446 U.S. 318, 331 (1980); see also p. 31, *infra*. Title VII therefore cannot fairly be construed as

imposing a jurisdictional bar to courts' considering particular allegations not sufficiently articulated in a charge.

C. The Statutory Purposes Do Not Require Treating Title VII's Charge-Filing Requirement As Jurisdictional

Petitioner also argues (Br. 27-32, 45-47) that the charge-filing requirement should not be deemed jurisdictional because it serves important statutory purposes. But a requirement should not "be ranked as jurisdictional merely because it promotes important congressional objectives." *Reed Elsevier*, 559 U.S. at 169 n.9. In any event, Congress's purposes do not require deeming the charge-filing requirement jurisdictional.

1. The EEOC's role in investigating and conciliating discrimination claims is a "key component of the statutory scheme." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015). And the charge-filing requirement serves important goals. A charge enables the EEOC to investigate and attempt to resolve claims or, failing that, to sue. The charge-filing requirement also was designed—as part of a legislative compromise—to *limit* the EEOC's authority by confining its investigations primarily to matters "relevant" to charges it receives, 42 U.S.C. 2000e-8(a), nearly all of which are filed by private parties. See *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 64 (1984).

Petitioner is mistaken, however, in assuming (Br. 27-32, 45-47) that, if the charge-filing requirement is nonjurisdictional, individuals alleging discrimination will cease filing charges and will instead proceed immediately to court, circumventing the EEOC. Deeming the charge-filing requirement nonjurisdictional does not excuse individuals from filing charges. It means the defense of failure to file a proper charge can be forfeited or waived, and courts need not raise it *sua sponte*. See

pp. 14-15, *supra*. But if a defendant timely raises a valid defense that the plaintiff failed to file a proper charge, "a court will usually dismiss a complaint for failure to do so." *Mach Mining*, 135 S. Ct. at 1651.

Nor is there any reason to suppose that defendants will ordinarily be unable to raise that defense. An employer sued under Title VII will know whether a charge was previously filed because the EEOC must "serve a notice of the charge" on the employer "within ten days" after it is filed, 42 U.S.C. 2000e-5(b), and the EEOC ordinarily serves a copy of the actual charge, 29 C.F.R. 1601.14(a). If no charge was filed, the employer has every reason to raise that failure as a defense, at least where (as is often true) the time for filing (or amending) a charge has expired.

Individuals alleging discrimination, in turn, have a powerful incentive to file charges in the first instance to avoid having their suits dismissed, in addition to hoping that the EEOC might help mediate a resolution or bring its own suit. Petitioner points to no evidence that individuals have bypassed the EEOC process entirely in the eight circuits that have held the charge-filing requirement nonjurisdictional. And although the EEOC does not publish circuit-specific statistics, the number of Title VII charges received nationwide has remained relatively consistent for decades.[5]

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[5] The EEOC received slightly more charges in FY2017 (59,466) than in FY1997 (58,615). EEOC, *Title VII of the Civil Rights Act of 1964 Charges, FY 1997-FY 2017*, https://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm. The number has fluctuated but has ranged between approximately 56,000 and 73,000 throughout (not counting charges filed with state or local agencies). *Ibid.*

To the extent petitioner fears that deeming the charge-filing rule nonjurisdictional will induce individuals alleging discrimination to file charges omitting specific *allegations* that they later attempt to raise in court, that fear is unfounded. An individual who enlists the EEOC's assistance (and hopes it will bring its own suit) has little incentive to leave potentially viable claims behind. And if the EEOC brings suit, it is not confined to the allegations of discrimination identified in the original charge. See *General Telephone*, 446 U.S. at 331.

If an individual nevertheless files a charge and then brings suit alleging different or additional claims, a defendant may seek dismissal of those claims. An employer ordinarily will be well positioned to do so; it will be aware of the nature of the allegations asserted in the charge. To be sure, lower courts have concluded that a private plaintiff may assert in litigation any allegation that is "like or reasonably related" to those in the initial charge. *E.g.*, *Arizona ex rel. Horne* v. *Geo Grp., Inc.*, 816 F.3d 1189, 1204-1205 (9th Cir. 2016), cert. denied, 137 S. Ct. 623 (2017). That reflects the fundamental nature of a charge, which marks the *beginning* of the process of investigating allegations, not the *end*. But if a plaintiff asserts a claim that is not reasonably related to the charge, the employer can seek dismissal. Plaintiffs have little reason to risk having their claims rejected in court by holding them back from the EEOC.

Petitioner's position thus principally matters only where either (A) the employer itself did not notice the difference between the charge and the complaint, or (B) the employer knew of the difference but decided not to raise it promptly as a defense. It is highly unlikely that Congress intended to strip jurisdiction over a claim in either circumstance. If even the employer does not

detect a deficiency in the allegations of a charge, it is unlikely the individual (often a layperson) recognized it either. And if a defendant deliberately chooses to bypass an available defense that the charge omitted a particular allegation, it is unrealistic to suppose that Congress intended to bar federal courts from entertaining the claim. That outcome would do little to advance the charge-filing requirement's purposes. Although the EEOC would have been unable to attempt conciliation of the claim, the likelihood of voluntary resolution in that scenario is presumably low. And although the EEOC would have missed the chance to bring its own suit, a private suit already has been brought, and the EEOC can seek leave to intervene if it deems the suit "of general public importance." 42 U.S.C. 2000e-5(f)(1).

2. Any marginal benefit that deeming the charge-filing requirement jurisdictional would generate is outweighed by the costs for courts and litigants. Labeling the charge-filing requirement jurisdictional matters most in cases where a defendant does not raise as a defense the plaintiff's failure to include a particular allegation in her EEOC charge; the plaintiff prevails on the merits to some extent, either by proving her claim or overcoming an interlocutory hurdle; and then the defendant seeks to undo that result by belatedly contesting jurisdiction (or a court is compelled to do so *sua sponte*). That outcome is unfair to a plaintiff who has achieved full or partial success litigating the merits, and it diminishes defendants' incentive to review a plaintiff's complaint carefully and raise any issues regarding the charge promptly. In this case, petitioner failed to raise its objection to respondent's charge until years into the litigation, after this Court denied certiorari in a prior appeal. Pet. App. 14a-15a.

Deeming the charge-filing requirement jurisdictional also would be "waste[ful] of adjudicatory resources" of courts. *Auburn*, 568 U.S. at 153. It would force trial and appellate courts to address the adequacy of the charge's allegations at the threshold, even when the parties do not raise the issue, and even where a claim clearly fails on the merits. See *Steel Co.*, 523 U.S. at 94. And if a defect in the charge surfaces late in the litigation or on appeal, it renders nugatory the time and effort spent by courts until that point.

Finally, although Title VII uses mandatory language in requiring a charge before suit is brought, 42 U.S.C. 2000e-5(e)(1) and (f)(1) (charge "shall be filed" before bringing suit), this case does not present the separate question whether any exceptions exist. Exceptions (if any) to procedural requirements should be applied "sparingly," *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 113 (2002), and excusing a failure to comply with the charge-filing requirement might be appropriate at most only in limited circumstances. For example, courts have recognized exceptions where an agency official erroneously refused to accept a charge or amendment or misled the individual alleging discrimination. See, *e.g.*, *McKee* v. *McDonnell Douglas Tech. Servs. Co.*, 700 F.2d 260, 263-264 (5th Cir. 1983); *Josephs* v. *Pacific Bell*, 443 F.3d 1050, 1054 (9th Cir. 2006). "[A]ffirmative misconduct on the part of a defendant" that "lulled the plaintiff into inaction" might also warrant an exception. *Baldwin Cnty. Welcome Ctr.* v. *Brown*, 466 U.S. 147, 151 (1984) (per curiam). The existence of any such exceptions is not presented here because petitioner "forfeited" the defense that respondent failed to comply with the charge-filing requirement. Pet. App. 15a. But the relevant point is that petitioner's position

would take off the table entirely any possibility of exceptions tailored to address such rare circumstances.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1331 provides:

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

2. 42 U.S.C. 2000e-5 provides:

Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the

Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the

persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[1] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed

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[1] So in original. Probably should be subsection "(b)".

statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the

alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by applica-

tion of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), of this section the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or polit-

ical subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the

commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which

the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have tak-

en the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing

party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

3. 42 U.S.C. 2000e-6 provides:

Civil actions by the Attorney General

(a) Complaint

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) Jurisdiction; three-judge district court for cases of general public importance: hearing, determination, expedition of action, review by Supreme Court; single judge district court: hearing, determination, expedition of action

The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the

acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) **Transfer of functions, etc., to Commission; effective date; prerequisite to transfer; execution of functions by Commission**

Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of title 5, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Transfer of functions, etc., not to affect suits commenced pursuant to this section prior to date of transfer

Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Investigation and action by Commission pursuant to filing of charge of discrimination; procedure

Subsequent to March 24, 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title.

4. 42 U.S.C. 2000e-16 provides:

Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment

who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Publishing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating

officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) **Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant**

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the

head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties..[1]

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

(f) Section 2000e-5(e)(3) of this title applicable to compensation discrimination

Section 2000e-5(e)(3) of this title shall apply to complaints of discrimination in compensation under this section.

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[1] So in original.

5. 29 C.F.R. 1601.12 provides:

Contents of charge; amendment of charge.

(a) Each charge should contain the following:

(1) The full name, address and telephone number of the person making the charge except as provided in § 1601.7;

(2) The full name and address of the person against whom the charge is made, if known (hereinafter referred to as the respondent);

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices: See § 1601.15(b);

(4) If known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the case may be; and

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State or local agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging

additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not be required to be redeferred.

6. 29 C.F.R. 1601.13 provides:

Filing; deferrals to State and local agencies.

(a) *Initial presentation of a charge to the Commission.* (1) Charges arising in jurisdictions having no FEP agency are filed with the Commission upon receipt. Such charges are timely filed if received by the Commission within 180 days from the date of the alleged violation.

(2) A jurisdiction having a FEP agency without subject matter jurisdiction over a charge (e.g., an agency which does not cover sex discrimination or does not cover nonprofit organizations) is equivalent to a jurisdiction having no FEP agency. Charges over which a FEP agency has no subject matter jurisdiction are filed with the Commission upon receipt and are timely filed if received by the Commission within 180 days from the date of the alleged violation.

(3) Charges arising in jurisdictions having a FEP agency with subject matter jurisdiction over the charges are to be processed in accordance with the Commission's deferral policy set forth below and the procedures in paragraph (a)(4) of this section.

(i) In order to give full weight to the policy of section 706(c) of title VII, which affords State and local fair employment practice agencies that come within the

provisions of that section an opportunity to remedy alleged discrimination concurrently regulated by title VII, the ADA, or GINA and State or local law, the Commission adopts the following procedures with respect to allegations of discrimination filed with the Commission. It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies. The Commission shall endeavor to maintain close communication with the State and local agencies with respect to all matters forwarded to such agencies and shall provide such assistance to State and local agencies as is permitted by law and as is practicable.

(ii) Section 706(c) of title VII grants States and their political subdivisions the exclusive right to process allegations of discrimination filed by a person other than a Commissioner for a period of 60 days (or 120 days during the first year after the effective date of the qualifying State or local law). This right exists where, as set forth in § 1601.70, a State or local law prohibits the employment practice alleged to be unlawful and a State or local agency has been authorized to grant or seek relief. After the expiration of the exclusive processing period, the Commission may commence processing the allegation of discrimination.

(iii) A FEP agency may waive its right to the period of exclusive processing of charges provided under section 706(c) of title VII with respect to any charge or category of charges. Copies of all such charges will be forwarded to the appropriate FEP agency.

(4) The following procedures shall be followed with respect to charges which arise in jurisdictions having a FEP agency with subject matter jurisdiction over the charges:

(i) Where any document, whether or not verified, is received by the Commission as provided in § 1601.8 which may constitute a charge cognizable under title VII, the ADA, or GINA, and where the FEP agency has not waived its right to the period of exclusive processing with respect to that document, that document shall be deferred to the appropriate FEP agency as provided in the procedures set forth below:

(A) All such documents shall be dated and time stamped upon receipt.

(B) A copy of the originial document, shall be transmitted by registered mail, return receipt requested, to the appropriate FEP agency, or, where the FEP agency has consented thereto, by certified mail, by regular mail or by hand delivery. State or local proceedings are deemed to have commenced on the date such document is mailed or hand delivered.

(C) The person claiming to be aggrieved and any person filing a charge on behalf of such person shall be notified, in writing, that the document which he or she sent to the Commission has been forwarded to the FEP agency pursuant to the provisions of section 706(c) of title VII.

(ii) Such charges are deemed to be filed with the Commission as follows:

(A) Where the document on its face constitutes a charge within a category of charges over which the FEP agency has waived its rights to the period of exclusive

processing referred to in paragraph (a)(3)(iii) of this section, the charge is deemed to be filed with the Commission upon receipt of the document. Such filing is timely if the charge is received within 300 days from the date of the alleged violation.

(B) Where the document on its face constitutes a charge which is not within a category of charges over which the FEP agency has waived its right to the period of exclusive processing referred to in paragraph (a)(3)(iii) of this section, the Commission shall process the document in accordance with paragraph (a)(4)(i) of this section. The charge shall be deemed to be filing with the Commission upon expiration of 60 (or where appropriate, 120) days after deferral, or upon the termination of FEP agency proceedings, or upon waiver of the FEP agency's right to exclusively process the charge, whichever is earliest. Where the FEP agency earlier terminates its proceedings or waives its right to exclusive processing of a charge, the charge shall be deemed to be filed with the Commission on the date the FEP agency terminated its proceedings or the FEP agency waived its right to exclusive processing of the charge. Such filing is timely if effected within 300 days from the date of the alleged violation.

(b) *Initial presentation of a charge to a FEP agency.* (1) When a charge is initially presented to a FEP agency and the charging party requests that the charge be presented to the Commission, the charge will be deemed to be filed with the Commission upon expiration of 60 (or where appropriate, 120) days after a written and signed statement of facts upon which the charge is based was sent to the FEP agency by registered mail or was otherwise received by the FEP agency,

or upon the termination of FEP agency proceedings, or upon waiver of the FEP agency's right to exclusively process the charge, whichever is earliest. Such filing is timely if effected within 300 days from the date of the alleged violation.

(2) When a charge is initially presented to a FEP agency but the charging party does not request that the charge be presented to the Commission, the charging party may present the charge to the Commission as follows:

(i) If the FEP agency has refused to accept a charge, a subsequent submission of the charge to the Commission will be processed as if it were an initial presentation in accordance with paragraph (a) of this section.

(ii) If the FEP agency proceedings have terminated, the charge may be timely filed with the Commission within 30 days of receipt of notice that the FEP agency proceedings have been terminated or within 300 days from the date of the alleged violation, whichever is earlier.

(iii) If the FEP agency proceedings have not been terminated, the charge may be presented to the Commission within 300 days from the date of the alleged violation. Once presented, such a charge will be deemed to be filed with the Commission upon expiration of 60 (or where appropriate, 120) days after a written and signed statement of facts upon which the charge is based was sent to the FEP agency by certified mail or was otherwise received by the FEP agency, or upon the termination of the FEP agency proceedings, or upon waiver of the FEP agency's right to exclusively process

the charge, whichever is earliest. To be timely, however, such filing must be effected within 300 days from the date of the alleged violation.

(c) *Agreements with Fair Employment Practice agencies.* Pursuant to section 705(g)(1) and section 706(b) of title VII, the Commission shall endeavor to enter into agreements with FEP agencies to establish effective and integrated resolution procedures. Such agreements may include, but need not be limited to, cooperative arrangements to provide for processing of certain charges by the Commission, rather than by the FEP agency during the period specified in section 706(c) and section 706(d) of title VII.

(d) *Preliminary relief.* When a charge is filed with the Commission, the Commission may make a preliminary investigation and commence judicial action for immediate, temporary or preliminary relief pursuant to section 706(f)(2) of title VII.

(e) *Commissioner charges.* A charge made by a member of the Commission shall be deemed filed upon receipt by the Commission office responsible for investigating the charge. The Commission will notify a FEP agency when an allegation of discrimination is made by a member of the Commission concerning an employment practice occurring within the jurisdiction of the FEP agency. The FEP agency will be entitled to process the charge exclusively for a period of not less than 60 days if the FEP agency makes a written request to the Commission within 10 days of receiving notice that the allegation has been filed. The 60-day period shall be extended to 120 days during the first year after the effective date of the qualifying State or local law.

7. 29 C.F.R. 1601.14 provides:

Service of charge or notice of charge.

(a) Within ten days after the filing of a charge in the appropriate Commission office, the Commission shall serve respondent a copy of the charge, by mail or in person, except when it is determined that providing a copy of the charge would impede the law enforcement functions of the Commissiion. Where a copy of the charge is not provided, the respondent will be served with a notice of the charge within ten days after the filing of the charge. The notice shall include the date, place and circumstances of the alleged unlawful employment practice. Where appropriate, the notice may include the identity of the person or organization filing the charge.

(b) District Directors, Field Directors, Area Directors, Local Directors, the Director of the Office of Field Programs, and the Director of Field Management Programs, or their designees, are hereby delegated the authority to issue the notice described in paragraph (a) of this section.

8. 29 C.F.R. 1601.28 provides:

Notice of right to sue: Procedure and authority.

(a) *Issuance of notice of right to sue upon request.* (1) When a person claiming to be aggrieved requests, in writing, that a notice of right to sue be issued and the charge to which the request relates is filed against a respondent other than a government, governmental agency or political subdivision, the Commission shall promptly issue such notice as described in § 1601.28(e)

to all parties, at any time after the expiration of one hundred eighty (180) days from the date of filing of the charge with the Commission, or in the case of a Commissioner charge 180 days after the filing of the charge or 180 days after the expiration of any period of reference under section 706(d) of title VII as appropriate.

(2) When a person claiming to be aggrieved requests, in writing, that a notice of right to sue be issued, and the charge to which the request relates is filed against a respondent other than a government, governmental agency or political subdivision, the Commission may issue such notice as described in § 1601.28(e) with copies to all parties, at any time prior to the expiration of 180 days from the date of filing of the charge with the Commission; provided that the District Director, the Field Director, the Area Director, the Local Director, the Director of the Office of Field Programs or upon delegation, the Director of Field Management Programs has determined that it is probable that the Commission will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge and has attached a written certificate to that effect.

(3) Issuance of a notice of right to sue shall terminate further proceeding of any charge that is not a Commissioner charge unless the District Director; Field Director; Area Director; Local Director; Director of the Office of Field Programs or upon delegation, the Director of Field Management Programs; or the General Counsel, determines at that time or at a later time that it would effectuate the purpose of title VII, the ADA, or GINA to further process the charge. Issuance of a

notice of right to sue shall not terminate the processing of a Commissioner charge.

(4) The issuance of a notice of right to sue does not preclude the Commission from offering such assistance to a person issued such notice as the Commission deems necessary or appropriate.

(b) *Issuance of notice of right to sue following Commission disposition of charge.* (1) Where the Commission has found reasonable cause to believe that title VII, the ADA, or GINA has been violated, has been unable to obtain voluntary compliance with title VII, the ADA, or GINA, and where the Commission has decided not to bring a civil action against the respondent, it will issue a notice of right to sue on the charge as described in § 1601.28(e) to:

(i) The person claiming to be aggrieved, or,

(ii) In the case of a Commissioner charge, to any member of the class who is named in the charge, identified by the Commissioner in a third-party certificate, or otherwise identified by the Commission as a member of the class and provide a copy thereof to all parties.

(2) Where the Commission has entered into a conciliation agreement to which the person claiming to be aggrieved is not a party, the Commission shall issue a notice of right to sue on the charge to the person claiming to be aggrieved.

(3) Where the Commission has dismissed a charge pursuant to § 1601.18, it shall issue a notice of right to sue as described in § 1601.28(e) to:

(i) The person claiming to be aggrieved, or,

(ii) In the case of a Commissioner charge, to any member of the class who is named in the charge, identified by the Commissioner in a third-party certificate, or otherwise identified by the Commission as a member of the class, and provide a copy thereof to all parties.

(4) The issuance of a notice of right to sue does not preclude the Commission from offering such assistance to a person issued such notice as the Commission deems necessary or appropriate.

(c) The Commission hereby delegates authority to District Directors, Field Directors, Area Directors, Local Directors, the Director of the Office of Field Programs, or Director of Field Management Programs or their designees, to issue notices of right to sue, in accordance with this section, on behalf of the Commission. Where a charge has been filed on behalf of a person claiming to be aggrieved, the notice of right to sue shall be issued in the name of the person or organization who filed the charge.[1]

(d) *Notices of right-of-sue for charges against Governmental respondents.* In all cases where the respondent is a government, governmental agency, or a political subivision, the Commission will issue the notice of right to sue when there has been a dismissal of a charge. The notice of right to sue will be issued in accordance with § 1601.28(e). In all other cases where

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[1] Formal Ratification-Notice is hereby given that the EEOC at a Commission meeting on March 12, 1974, formally ratified the acts of the District Directors of EEOC District Offices in issuing notices of right to sue pursuant to Commission practice instituted on October 15, 1969, and continued through March 18, 1974. 39 FR 10178 (March 18, 1974).

the respondent is a government, governmental agency, or political subdivision, the Attorney General will issue the notice of right to sue, including the following cases:

(1) When there has been a finding of reasonable cause by the Commission, there has been a failure of conciliation, and the Attorney General has decided not to file a civil action; and

(2) Where a charging party has requested a notice of right to sue pursuant to § 1601.28(a)(1) or (2). In cases where a charge of discrimination results in a finding of cause in part and no cause in part, the case will be treated as a "cause" determination and will be referred to the Attorney General.

(e) *Content of notice of right to sue.* The notice of right to sue shall include:

(1) Authorization to the aggrieved person to bring a civil action under title VII, the ADA, or GINA pursuant to section 706(f)(1) of title VII, section 107 of the ADA, or section 207 of GINA within 90 days from receipt of such authorization;

(2) Advice concerning the institution of such civil action by the person claiming to be aggrieved, where appropriate;

(3) A copy of the charge;

(4) The Commission's decision, determination, or dismissal, as appropriate.

No. 18-525

IN THE

Supreme Court of the United States

FORT BEND COUNTY, TX,
Petitioner,

v.

LOIS M. DAVIS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICI CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL RETAIL FEDERATION IN SUPPORT OF PETITIONER

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March 2019

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BRIEF *AMICI CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL RETAIL FEDERATION IN SUPPORT OF PETITIONER

The Center for Workplace Compliance, National Federation of Independent Business Small Business Legal Center, Chamber of Commerce of the United States of America, and National Retail Federation respectfully submit this brief as *amici curiae*.[1] The

[1] The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, or

brief supports the position of Petitioner before this Court and thus urges reversal of the decision below.

INTEREST OF THE *AMICI CURIAE*

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes more than 200 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of employment-related regulations.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents businesses nationwide.

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their counsel contributed money to fund the brief's preparation or submission.

The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of concern to the nation's business community.

The National Retail Federation (NRF) is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. Retail is the largest private-sector employer in the United States, supporting one in four U.S. jobs—approximately 42 million American workers—and contributing $2.6 trillion to annual GDP. As the world's umbrella retail federation, NRF has long advocated before Congress and the courts on a host of employment-related issues, including but not limited to arbitration clauses, workplace rules, and anti-discrimination laws.

Most if not all of *amici's* members are employers, or representatives of employers, subject to the federal employment nondiscrimination statutes enforced by

the U.S. Equal Employment Opportunity Commission (EEOC), including Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.* Accordingly, as potential respondents to discrimination charges subject to investigation and enforcement by the EEOC, the issue presented in this case is extremely important to the nationwide constituencies that *amici* represent.

As national representatives of large corporations and small businesses alike, *amici* have perspectives and experience that can help the Court assess issues of law and public policy that have been raised in this case, beyond the help that the lawyers for the parties can provide. Accordingly, *amici* seek to bring these policy considerations to the Court's attention and assist the Court in understanding the broader implications of the case to the employer community as a whole.

Amici have participated in numerous cases before this Court involving the proper scope and interpretation of Title VII. Because of their extensive experience in these matters, *amici* are especially well situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Respondent Lois Davis worked for Petitioner Fort Bend County, Texas as an information technology supervisor. Pet. App. 2a. In 2010, she filed an internal complaint accusing her director of sexual harassment, which led to an investigation and the director's eventual employment resignation. *Id.* In March 2011, Davis filed a formal discrimination charge with the Equal Employment Opportunity Commission (EEOC) alleging that she was sexually harassed by her

director and that her immediate supervisor subjected her to unlawful retaliation for complaining about it. Pet. App. 2a; Jt. App. 70.

That summer, the County finalized plans to relocate its offices to a new facility, and required all technical support personnel, including Davis, to work the weekend of July 4, 2011. Pet. App. 18a. Citing a "previous religious commitment," Davis advised that she would not attend. *Id.* Despite repeated warnings that noncompliance would result in disciplinary action, Davis nevertheless failed to report to work as required, resulting in the termination of her employment. *Id.*

Subsequently, Davis amended an intake questionnaire accompanying her charge by handwriting the word "religion" next to a section titled, "Employment Harms and Actions," but failed to provide any additional details or actually amend her filed charge. Pet. App. 2a. After receiving a right-to-sue notice, she brought a Title VII action alleging that the County retaliated against her for complaining about sexual harassment and discriminated against her based on religion by requiring her to work on Sunday, July 3, as part of the facility relocation. *Id.*

The County moved to dismiss Davis's religious discrimination claim, arguing that because she failed to raise the claim in her EEOC charge, she failed to exhaust administrative remedies, thus depriving the district court of subject matter jurisdiction over the matter. Pet. App. 3a. The trial court acknowledged a disagreement among courts within the Fifth Circuit as to whether Title VII's administrative exhaustion requirement is jurisdictional, or merely a precondition to suit that is subject to equitable waiver. Pet. App. 23a-27a. Siding with the former view, and concluding that Davis's single-word notation on the intake form

did not constitute a charge or put the County or the EEOC on notice of her religious discrimination claim, the district court held that Davis failed to exhaust her administrative remedies and granted the County's motion. Pet. App. 29a-37a.

The Fifth Circuit reversed. Pet. App. 15a. Also acknowledging the circuit split, it joined the majority of courts that have found Title VII's administrative exhaustion requirement to be non-jurisdictional. Pet. App. 12a-13a. It then held that, because the County waived its exhaustion defense by failing to raise it earlier in the litigation, Davis could proceed with her suit notwithstanding her failure to exhaust. Pet. App. 13a-15a.

The County filed a Petition for a Writ of Certiorari, which this Court granted on January 11, 2019. *Ft. Bend County, TX v. Davis*, 2019 WL 166880 (U.S. Jan. 11, 2019).

SUMMARY OF ARGUMENT

As the Petition explains, elaborate and detailed administrative exhaustion requirements are by their nature jurisdictional. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, provides a quintessential example of such a scheme. In addition to establishing broad workplace nondiscrimination protections, Title VII created the Equal Employment Opportunity Commission (EEOC), which would serve as the chief federal agency authorized to enforce the Act. 42 U.S.C. § 2000e-4.

Among the EEOC's principal responsibilities are to make, receive, and investigate written charges of discrimination. 42 U.S.C. § 2000e-5(b). Where it finds reasonable cause to believe that unlawful discrimination has occurred, the statute requires that the

agency seek to resolve the matter informally through "conference, conciliation and persuasion." *Id.* Where its efforts to achieve voluntary compliance prove unsuccessful, the EEOC must notify the charging party of his or her right to sue the accused employer in federal court. Although Congress subsequently amended Title VII to give the EEOC litigation authority,[2] its duty to investigate, attempt conciliation, and thereafter provide the charging party with written authorization to sue, remained undisturbed.

Thus, a Title VII plaintiff may bring suit only upon receipt of a right-to-sue notice from the EEOC. In other words, Title VII precludes suit by any individual who has not received authorization from the EEOC to do so – such authorization being in the form of a right-to-sue notice issued after the agency has completed its administrative obligations with respect to a filed charge, including engaging in statutory conciliation efforts. As this Court has said, "That obligation is a key component of the statutory scheme." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) (citation omitted). It also is a task that the EEOC must complete before it may bring suit in its own name, and one which cannot be accomplished absent administrative exhaustion. In other words, courts may not hear unexhausted claims no matter who brings them (the complainant or the EEOC) or when they are brought.

Title VII's detailed administrative and enforcement scheme thus is both premised and dependent upon the exhaustion of administrative remedies. Treating that requirement as anything less than jurisdictional would diminish its role in the statutory scheme and be

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[2] See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

inconsistent with many of the purposes underlying Title VII, such as empowering the EEOC to investigate and attempt to resolve discrimination claims informally, reserving litigation as an avenue of last resort.

Whether Title VII's administrative exhaustion requirement is jurisdictional or simply a prerequisite to suit that may be waived is an issue of significant practical importance to employers. If the latter is true, *private* parties could subvert (intentionally or inadvertently) the *public* and *governmental* interest in administrative consideration and perhaps resolution of claims. Moreover, charging parties would have less incentive to craft thoughtful and complete administrative charges, leading to critical omissions resulting in unfair surprise to their employers months, or even years, after the alleged incidents occurred. It also could deprive employers of the opportunity to investigate and resolve workplace disputes quickly and informally.

It is especially important that employers be able to investigate and resolve allegations of workplace harassment as soon as possible, not only to remedy the environment for the complainant but also to identify and correct behavior or circumstances that could lead to future problems or undermine the employer's efforts to promote a harassment-free workplace. Moreover, administrative conciliation is confidential, which helps the parties resolve matters in a less acrimonious environment before positions become hardened in litigation. All of those interests help confirm the centrality of exhaustion in Congress's detailed and comprehensive remedial scheme.

ARGUMENT

I. TITLE VII'S PLAIN TEXT AND POLICY AIMS FIRMLY ESTABLISH THAT EXHAUSTION OF ADMINISTRATIVE REMEDIES IS A NON-WAIVABLE, JURISDICTIONAL PREREQUISITE TO SUIT

As Petitioner explains, detailed and comprehensive administrative exhaustion schemes are typically jurisdictional. Brief for Pet. 15-18. Title VII of the Civil Rights Act of 1964 (Title VII) – which prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a)(1) – provides precisely such a scheme. It is enforced by the Equal Employment Opportunity Commission (EEOC), which "is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title." 42 U.S.C. § 2000e-5(a). "When Congress first enacted Title VII in 1964 it selected (c)ooperation and voluntary compliance as the preferred means for achieving the goal of equality of employment opportunities." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367-68 (1977) (citation omitted). In furtherance of that aim, "Congress created the EEOC and established an administrative procedure whereby the EEOC 'would have the opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.'" *Id.* at 368 (citation omitted).

A. While No One Can Be Forced To File A Charge, Title VII's Plain Text Categorically Precludes Suit By Any Party – Aggrieved Person And EEOC Alike – That Fails To Exhaust Administrative Remedies

Title VII provides, and this Court has confirmed, that the path to federal court for a Title VII plaintiff begins with the filing of a timely charge of discrimination. 42 U.S.C. § 2000e-5(b), (e). Indeed, the statute sets forth "'an integrated, multistep enforcement procedure' that ... begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life*, 432 U.S. at 359) (footnote omitted); see also *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015). Although the statute does not require all discrimination victims to file an EEOC charge, doing so irrefutably is a mandatory precondition for those seeking to commence a Title VII action in federal court. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973) (characterizing the timely filing of a discrimination charge, and "receiving and acting upon the Commission's statutory notice of the right to sue," as "jurisdictional prerequisites to federal action") (citations omitted); see also *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1185 (4th Cir. 1981) ("[E]ach step in the Commission's administrative process is designed to be a prerequisite to the following step and, ultimately, to suit") (citation omitted). Moreover, "'[e]ach incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable unlawful employment practice' that must be individually addressed before the EEOC." *Sellers v. Deere & Co.*, 791 F.3d 938, 943 (8th Cir. 2015) (quoting *Richter v.*

Advance Auto Parts, Inc., 686 F.3d 847, 851 (8th Cir. 2012)) (*per curiam*).

1. Title VII forecloses judicial review of claims that were not subject to a valid EEOC charge

Title VII "specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). Subsection (f) of Section 2000e-5 provides, in relevant part:

> If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section ... or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, *the Commission ... shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge* (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

42 U.S.C. § 2000e-5(f)(1) (emphasis added).

Thus, a civil action for Title VII discrimination may be commenced only upon receipt of a "right-to-sue" notice, as it is so called, which effectively serves as a release of the EEOC's jurisdiction over the charge, thereby permitting the charging party to pursue his or

her claim in federal court. The EEOC in its Title VII procedural regulations explicitly characterizes the right-to-sue notice as a charging party's "authorization" to proceed with a private action. See 29 C.F.R. § 1601.28(e)(1) ("The notice of right to sue shall include: (1) Authorization to the aggrieved person to bring a civil action under title VII ... within 90 days from receipt of such authorization"). As this Court has observed, "an employee *must* obtain a right-to-sue letter before bringing suit—and a court will typically insist on satisfaction of that condition." *Mach Mining*, 135 S. Ct. at 1651 (citations omitted) (emphasis added).

2. EEOC civil enforcement also depends on the agency's completion of administrative preconditions tied to the underlying charge

Title VII sets forth a detailed administrative procedure that the EEOC must follow in every instance, including informal (and confidential) conciliation designed to provide prompt notice to the employer and avoid protracted court battles:

> [T]he Commission shall serve a notice of the charge ... within ten days, and shall make an investigation thereof. ... If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge .... If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

42 U.S.C. § 2000e-5(b).

When first enacted, Title VII gave the EEOC limited authority to prevent and correct discrimination through this administrative framework of charge investigations and informal conciliation. Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b). In 1972, Congress amended Title VII to authorize the EEOC to bring a civil lawsuit against private employers in its own name, both on behalf of alleged victims and in the public interest. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972). "Although the 1972 amendments provided the EEOC with the additional enforcement power of instituting civil actions in federal courts, Congress preserved the EEOC's administrative functions in § 706 of the amended Act." *Occidental Life*, 432 U.S. at 368. Thus, even in conferring the EEOC with the authority to litigate, Congress retained the statute's requirement that the agency fulfill all of its investigative duties as a strict precondition to suit. *Id.*

One such obligation is that the EEOC must attempt to resolve meritorious discrimination claims administratively through conciliation. "Title VII, as the Government acknowledges, imposes a duty on the EEOC to attempt conciliation of a discrimination charge prior to filing a lawsuit. ... That obligation is a key component of the statutory scheme." *Mach Mining, LLC*, 135 S. Ct. at 1651 (citation omitted). Accordingly, this Court in *Mach Mining* found conciliation to be a required prerequisite to an EEOC public enforcement action, observing that if the EEOC were to make no reasonable effort to conciliate prior to filing suit, it "would have failed to satisfy a necessary condition of litigation." *Id.* at 1652.

The EEOC literally cannot satisfy its statutory pre-suit obligations where an alleged discrimination

victim fails to exhaust administrative remedies with the agency. Indeed, the EEOC "relies on charges not only as its principal source of information regarding unlawful conduct, but also, in the case of Title VII and the ADA, *as a statutory prerequisite for its investigations and proceedings*." EEOC, *Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) enforced statutes*, at (III)(A) n.4 (Apr. 1997) (citations omitted) (emphasis added).[3]

Thus, while Congress has authorized the EEOC to enforce Title VII through civil actions in federal court, the agency simply cannot do so in the absence of a charge. In other words, "completion of the full administrative process is a prerequisite to the EEOC's power to bring suit in its own name." *Am. Nat'l Bank*, 652 F.2d at 1186. It would make little sense to conclude, in establishing a multifaceted administrative enforcement scheme that is triggered *only* by a pending charge, that Congress would have at the same time made the act of filing a charge, and thus exhausting administrative remedies, nothing more than a waivable claim-processing rule. Giving private parties discretion to undo the mandatory scheme, either intentionally or inadvertently, would prevent the EEOC from performing its important role.

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[3] *Available at* https://www.eeoc.gov/policy/docs/waiver.html (last visited Mar. 4, 2019).

B. The EEOC Was Established In Title VII To Prevent And Correct Discriminatory Employment Practices Whenever Possible Through Voluntary Means – Which Cannot Be Accomplished Absent Administrative Exhaustion

Apart from serving as the principal means through which the EEOC may prosecute Title VII violations in court, administrative charges provide a basis for the EEOC to review, assess, and seek changes to employment practices and decisions that may be impeding equal employment opportunity and nondiscrimination. That important policy objective provides further confirmation that Title VII's detailed remedial scheme serves objectives beyond those served by non-jurisdictional claim-processing rules. Relieving plaintiffs of the obligation to exhaust Title VII's administrative remedies by filing a charge with the EEOC thus almost certainly would not only impede meaningful and consistent antidiscrimination enforcement by the EEOC, but also would undermine its efforts to secure compliance through voluntary means.

One of the bedrock policies underlying Title VII is that the favored means of resolving employment discrimination issues is not through litigation, but through voluntary compliance and cooperation. See, *e.g.*, *Gardner-Denver,* 415 U.S. at 52. Indeed, Title VII expressly *requires* the EEOC to attempt to eliminate unlawful employment practices through "informal methods of conference, conciliation, and persuasion" before resorting to litigation. See 42 U.S.C. § 2000e-5(b).

EEOC conciliation unquestionably plays a critical role in effectuating Title VII's ultimate goal of voluntary compliance. The EEOC in its procedural regula-

tions observes that in enacting Title VII, Congress "strongly encouraged employers ... to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action." 29 C.F.R. § 1608.1(b). EEOC conciliation is intended to facilitate those efforts under the watchful eye of the agency whose responsibility is to ensure that federal public policy is served. Thus, EEOC conciliation is aptly characterized as "the culmination of the mandatory administrative procedures, whose purpose is to achieve voluntary compliance with the law. Each step in the process – investigation, determination, conciliation, and if necessary suit – is intimately related to the others." *EEOC v. Allegheny Airlines*, 436 F. Supp. 1300, 1305 (W.D. Pa. 1977).

In addition to promoting judicial efficiencies by avoiding protracted litigation of unvetted claims, exhaustion allows the EEOC to counsel would-be charging parties about their rights and assist them in crafting proper charges, and enables the agency to apply its considerable Title VII subject matter expertise in determining which claims are meritorious. While charging parties may bring suit even on exhausted claims that were found by the EEOC to have no merit, having vetted their claim with the EEOC invariably will help inform the decision whether to exercise that right and how to frame any claims in court.

C. There Is A Profound Difference Between Filing A Charge On Time, And Not Filing At All

Under Title VII, charging parties generally are required to file a charge "in writing under oath or

affirmation" with the EEOC no later than 300 days from the date of the alleged violation. 42 U.S.C. § 2000e-5(e)(1). This Court has held that timely charge filing "is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (footnote omitted). The Court reasoned:

> The structure of Title VII, the congressional policy underlying it, and the reasoning of our cases all lead to this conclusion.
>
> The provision granting district courts jurisdiction under Title VII, 42 U.S.C. §§ 2000e-5(e) and (f), does not limit jurisdiction to those cases in which there has been a timely-filing with the EEOC. It contains no reference to the timely filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.

Id. at 393-94 (footnotes omitted).

Zipes provides ready support for treating administrative exhaustion as a jurisdictional mandate, rather than as simply a "prudential" prerequisite to suit. As this Court pointed out there, the parts of Title VII establishing federal court subject matter jurisdiction – Sections 2000e-5(e) and (f) – do not make timely charge filing a jurisdictional requirement. As noted above, however, Section 2000e-5(f) specifies that the EEOC *shall* provide a right-to-sue notice and "within ninety days after the giving of such notice a civil action *may be brought against the respondent*

named in the charge." 42 U.S.C. § 2000e-5(f)(1) (emphasis added). If "receiving and acting upon the Commission's statutory notice of the right to sue" is a "jurisdictional prerequisite[]," *McDonnell Douglas*, 411 U.S. at 798, then so too must the obligation to actually file a charge, without which there is no right-to-sue notice. Put simply, failing to exhaust administrative remedies has a fundamentally different legal effect than simply filing a charge outside the applicable limitations period. In other words, courts may not hear unexhausted claims no matter who brings them (the complainant or the EEOC) or when they are brought.

This Court has explained:

> Among the types of rules that should not be described as jurisdictional are what we have called 'claim-processing rules.' These are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times. Filing deadlines ... are quintessential claim-processing rules.

Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 435 (2011) (citations omitted). Receipt of a right-to-sue notice signaling exhaustion of administrative remedies is not a "claim-processing rule" at all.

Rather, administrative exhaustion serves to authorize the charging party – whose charge at this point has been fully "processed" by the EEOC – to pursue a lawsuit in federal court. It is thus quite unlike other charge-related requirements that are subject to equitable waiver (or, as in the case of the ten-day notice requirement, have been treated as waivable). Instead, it serves the other important statutory objectives discussed above.

To treat the failure to exhaust administrative remedies as less than jurisdictional would be to upend Title VII's entire enforcement scheme and introduce procedural complexities that Congress could not have contemplated. For instance, if a Title VII plaintiff asserts an unexhausted sex discrimination claim in federal court, what limitations period applies? Title VII provides two limitations periods – one pertaining to the timeframe within which a charge must be filed with the EEOC and the other pertaining to when a charging party may file suit after having received a right-to-sue notice. Would timeliness be determined based on when the plaintiff could or should have exhausted his or her remedies? It is difficult to conceive of a workable standard for answering those questions, much less the circumstances under which a failure to exhaust should be excused on equitable grounds.

II. TREATING TITLE VII'S EXHAUSTION REQUIREMENT AS A NON-JURISDICTIONAL PRECONDITION SUBJECT TO EQUITABLE WAIVER WOULD UNDERMINE PROACTIVE DISCRIMINATION PREVENTION EFFORTS

Timely, competent processing of discrimination claims by the EEOC also is vital to ensuring compliance with the equity and fairness principles underlying Title VII to which *amici* are deeply committed. Among other things, it promotes sound employment relations and compliance programs by encouraging early detection and correction of potential violations, without resort to protracted federal court litigation. For instance, and as noted above, proper EEOC charge investigation sets the stage for meaningful and confidential conciliation of meritorious claims, which

benefits respondents seeking to avoid the cost and reputational damage associated with employment discrimination litigation, as well as charging parties seeking speedy resolution to their workplace disputes. None of those objectives can be achieved if Title VII's administrative exhaustion requirement is not strictly enforced. Rather, failure to exhaust administrative remedies impedes proactive prevention, and swift correction, of workplace discrimination.

Title VII expressly requires the EEOC to serve an employer with notice of a charge of discrimination within ten days of its filing date. 42 U.S.C. § 2000e-5(e)(1). "[T]he principal objective of the provision seems to have been to provide employers fair notice that accusations of discrimination have been leveled against them and that they can soon expect an investigation by the EEOC." *Shell Oil*, 466 U.S. at 74. The statutory notice provision serves important practical purposes as well.

For instance, many employers use formal notice of the filing of an EEOC charge to initiate an internal investigation to determine what action, if any, should be taken to mitigate harm to the complainant or others. Often a charging party will have bypassed a company's internal dispute resolution procedures in favor of submitting a charge to the EEOC. Under those circumstances, the employer will not have had an opportunity to review and address the claims until served with the charge. If an opportunity to resolve the matter quickly without resort to a lengthy investigation or litigation exists, most employers will pursue it. Once litigation commences, any real chance to resolve the matter amicably and informally is lost.

Particularly in the case of workplace harassment, employers have a strong interest in being able to

promptly investigate and pursue immediate corrective action not only to remedy the environment for the complainant but also to protect others from being victimized. As this Court observed, "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms [which] would effect Congress' intention to promote conciliation rather than litigation in the Title VII context, and the EEOC's policy of encouraging the development of grievance procedures." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (citations omitted).

In addition to increasing the risk of legal liability and reputational damage, inattention to workplace harassment issues can have a significant impact on the workplace – costing American businesses millions annually in lost productivity, absenteeism and turnover, as well as in increased medical costs. See, *e.g.*, EEOC Select Task Force on the Study of Harassment in the Workplace, *Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* 18 (June 2016).[4] Efforts to learn about workplace issues – and to use those lessons to better prevent, detect, and correct harassment – are undermined by failure to strictly enforce the exhaustion requirement.

Exhaustion of administrative remedies also gives the employer an opportunity—before it is publicly accused in court of the most serious civil-rights violations—to resolve the matter privately. Congress imposed a conciliation obligation because it recognized that lengthy, expensive litigation does not best advance the interests of businesses or employees; a quick, cheap resolution is often preferable for both

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[4] *Available at* https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf (last visited Mar. 4, 2019).

sides. See *Ellerth*, 524 U.S. at 764. And Congress further recognized that such a resolution is most likely to be achieved out of the public eye, before positions harden through the adversarial judicial process. Accordingly, Congress guaranteed employers a chance for private resolution. See 42 U.S.C. § 2000e-5(b) ("Nothing said or done during and as a part of such informal endeavors may be made public ...."). That is exactly why Congress made conciliation "a key component of the statutory scheme." *Mach Mining*, 135 S. Ct. at 1651.

Finally, employers need to operate without the constant pressure that flows from the uncertainty over whether they will have to defend past employment decisions against challenges in the distant future. As noted above, treating exhaustion as non-jurisdictional would raise a serious question as to what limitations period if any applies and when it begins to run. Interpreting Title VII's exhaustion requirement as anything other than jurisdictional would prejudice employers that reasonably and lawfully disposed of employment records that were not relevant at the time to any pending investigation or proceeding. It also would unfairly hamper employers' ability to defend themselves against unexhausted claims in court.

CONCLUSION

For the foregoing reasons, *amici curiae* Center for Workplace Compliance, National Federation of Independent Business Small Business Legal Center, Chamber of Commerce of the United States of America, and National Retail Federation respectfully submit that the decision below should be reversed.

Respectfully submitted,

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March 2019

No. 18-525

IN THE

Supreme Court of the United States

FORT BEND COUNTY,

Petitioner,

v.

LOIS M. DAVIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text, history, and values. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text, history, and values, and thus has an interest in ensuring that statutory prerequisites to filing suit are treated as jurisdictional only when Congress clearly requires that result.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent Lois Davis sued her employer under Title VII of the Civil Rights Act of 1964, a federal law that prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). Davis alleged that her employer had engaged in religious discrimination, sex-based discrimination, and retaliation. Five years into the litigation—after the Fifth Circuit concluded that there were "genuine disputes of material fact" regarding whether Davis held a bona fide religious belief that her employer could have but failed to accommodate,

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

Pet. App. 3a—her employer for the first time argued that Davis's claim was barred because she failed to exhaust her administrative remedies before the Equal Employment Opportunity Commission (EEOC). *Id.* This argument came too late, and Davis's claim should be allowed to proceed.

Before filing a Title VII suit alleging discrimination in federal court, a claimant must file a timely charge of discrimination with the EEOC. This so-called exhaustion requirement, everyone agrees, is mandatory and helps ensure that discrimination claims are resolved in an orderly manner. The question in this case, however, is whether the employer's failure to argue exhaustion until five years into the litigation constitutes forfeiture of that argument. And the answer to that question turns on whether the exhaustion requirement is jurisdictional—*i.e.*, whether it goes to the power of the court to hear the case—or whether it is a claim-processing rule that does not go to a court's subject-matter jurisdiction. If the exhaustion requirement is simply a claim-processing rule, defendants can forfeit it by failing to timely raise the argument in court.

This case arises following a years-long attempt by this Court to more carefully police the use of the label "jurisdictional." While "[c]ourts—including this Court—have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations," the Court has more recently "evince[d] a marked desire to curtail such 'drive-by jurisdictional rulings.'" *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)). That is because "[b]randing a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system." *Henderson ex rel. Henderson v.*

Shinseki, 562 U.S. 428, 434 (2011). Jurisdictional prerequisites cannot be waived or forfeited by parties, and can therefore be raised at any time, including months or years into litigation. Moreover, courts are required to assess jurisdictional requirements *sua sponte*. These rules make sense because jurisdictional requirements go to a court's power to hear a case, but they come at a cost to litigants and to judges, who must address jurisdictional issues even when they are not properly raised and argued.

Given the dramatic consequences that result when a requirement is deemed jurisdictional, this Court has applied a "readily administrable bright line" test for determining whether a particular statutory prerequisite to bringing suit concerns a court's subject-matter jurisdiction: "[i]f the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006) (emphasis added). And the Court has repeatedly applied that standard to claim-processing rules in the Title VII context and elsewhere, holding that these rules are not jurisdictional unless Congress has clearly stated that they are or there has been a long tradition of treating them as such.

Applying that standard here, Title VII's exhaustion requirement is not jurisdictional. To start, nothing in the text of the exhaustion requirement suggests that it should be construed as a jurisdictional prerequisite to bringing suit. Furthermore, just like other Title VII requirements that this Court has held are non-jurisdictional, the exhaustion requirement does not appear in Title VII's jurisdiction-granting provision, 42 U.S.C. § 2000e-5(f)(3), or in 28 U.S.C. § 1331, which grants federal courts subject-matter jurisdiction over federal

questions. Finally, there is no long-standing tradition of treating the Title VII exhaustion requirement as jurisdictional; to the contrary, this Court has repeatedly implied that the requirement is not jurisdictional, and eight courts of appeals have explicitly held as much. In short, Title VII's exhaustion requirement is a claim-processing rule: "important and mandatory," but not one that should be "given the jurisdictional brand," *Henderson*, 562 U.S. at 435.

ARGUMENT

I. THIS COURT HAS ADOPTED A CLEAR-STATEMENT RULE TO DETERMINE WHETHER STATUTORY REQUIREMENTS ARE JURISDICTIONAL.

1. This case, like many before it, "concerns the distinction between two sometimes confused or conflated concepts: federal-court 'subject-matter' jurisdiction over a controversy; and the essential ingredients of a federal claim for relief." *Arbaugh*, 546 U.S. at 503. Subject-matter jurisdiction refers to "the courts' statutory or constitutional power to adjudicate the case." *Steel Co.*, 523 U.S. at 89 (emphasis omitted); *see Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) ("[J]urisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." (quotation marks and citation omitted)).

Subject-matter jurisdiction contrasts with other "predicate[s] for relief," which are "merits-related determination[s]" that do not go to a court's jurisdiction. *Arbaugh*, 546 U.S. at 511 (quoting 2 J. Moore et al., *Moore's Federal Practice* § 12.30[1] (3d ed. 2005)). Such predicates include so-called claim-processing rules, "rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."

Henderson, 562 U.S. at 435. Though these rules are "important and mandatory," they "should not be given the jurisdictional brand." *Id.*

This Court has repeatedly lamented the lack of precision that is often associated with the term "jurisdiction." "Courts—including this Court—have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis." *Reed Elsevier*, 559 U.S. at 161. "[R]ecent cases," however, "evince a marked desire to curtail such drive-by jurisdictional rulings, which too easily can miss the critical differences between true jurisdictional conditions and nonjurisdictional limitations on causes of action." *Id.* (quotation marks and citations omitted); *see Steel Co.*, 523 U.S. at 91 ("drive-by jurisdictional rulings . . . have no precedential effect"); *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) ("Clarity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.").

To bring order to these categorizations, this Court has developed a "readily administrable bright line" test for determining whether a particular statutory prerequisite to bringing suit is jurisdictional. *Arbaugh*, 546 U.S. at 516. Specifically, "[i]f the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Id.* at 515-16 (emphasis added); *see Henderson*, 562 U.S. at 439 (a provision is not jurisdictional if its language "provides *no clear indication* that Congress wanted that provision to be

treated as having jurisdictional attributes" (emphasis added)). If the legislature does not "clearly state[]" such an intention, then the statutory limitation is simply "an element of a plaintiff's claim for relief," not a jurisdictional prerequisite. *Arbaugh*, 546 U.S. at 515-16; *see United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1638 (2015) ("making a statute of limitations jurisdictional . . . requires [a] *plain statement*; otherwise, we treat a time bar as a mere claims-processing rule" (emphasis added)).

Requiring Congress to clearly state that a particular prerequisite is jurisdictional makes sense given the significant consequences that attach to jurisdictional requirements. *See Henderson*, 562 U.S. at 434 (calling a requirement jurisdictional "is not merely semantic but [a question] of considerable practical importance for judges and litigants"). Indeed, "[b]randing a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system." *Id.*

To start, our justice system ordinarily "relies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356 (2006). And failure to "raise a claim for adjudication at the proper time" generally results in "forfeiture of that claim." *Id.* at 356-57; *see Henderson*, 562 U.S. at 434 ("For purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be raised at particular times.").

By requiring litigants to raise all arguments in defense of their position early in litigation, the system "induce[s] the timely raising of claims and objections," which allows courts "to determine the relevant facts and adjudicate the dispute" in the first instance. *Puckett v. United States*, 556 U.S. 129, 134 (2009). Put

differently, "waiver and forfeiture rules . . . ensure that parties can determine when an issue is out of the case, and that litigation remains, to the extent possible, an orderly progression." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 n.6 (2008).

Jurisdictional requirements, however, upend the ordinary operation of these rules. "[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630 (2002). Thus, if a particular prerequisite goes to a court's subject-matter jurisdiction, a litigant can raise that issue "at any time," *Henderson*, 562 U.S. at 434, including after a trial has concluded, on appeal, or after a remand. Parties can even engage in "sandbagging," *i.e.*, "remaining silent about [an] objection and belatedly raising the error only if the case does not conclude in [their] favor." *Puckett*, 556 U.S. at 134; *Henderson*, 562 U.S. at 434-35 ("a party, after losing at trial, may move to dismiss the case because the trial court lacked subject-matter jurisdiction"). Indeed, as this Court has recognized, "a party may raise [a jurisdictional] objection *even if the party had previously acknowledged the trial court's jurisdiction*." *Henderson*, 562 U.S. at 435 (emphasis added). This type of gamesmanship can tax judicial resources by requiring courts to expend time and energy on the merits of a case, only to have to dismiss the case months or years into litigation because of an argument that the court lacked jurisdiction which could have been—but was not—raised earlier.

Relatedly, "courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh*, 546 U.S. at 514; *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("subject-matter delineations must be policed

by the courts on their own initiative even at the highest level"). Jurisdictional requirements, then, impose a burden on courts, both at the trial and appellate level, to determine whether those requirements are met in every case. This can often be time-consuming and difficult without the cooperation of the parties: "if subject-matter jurisdiction turns on contested facts," the judge might have to "review the evidence and resolve the dispute on her own." *Arbaugh*, 546 U.S. at 514.

These costs to the judicial system are necessary when a particular issue actually goes to jurisdiction—that is, the power of a court to hear a case. But "[b]ecause the consequences that attach to the jurisdictional label may be so drastic," this Court has "br[ought] some discipline to the use of this term." *Henderson*, 562 U.S. at 435. Congress must "clearly state[]" its intention that a particular prerequisite is jurisdictional for those drastic consequences to follow. *Arbaugh*, 546 U.S. at 515. If Congress has not spoken clearly, the Court will presume that the requirement is a claim-processing rule—"mandatory" to be sure, but not "given the jurisdictional brand," *Henderson*, 562 U.S. at 435.

2. This Court has applied this clear-statement test many times, both in the Title VII context and elsewhere, and has repeatedly rejected claims that statutory prerequisites are jurisdictional unless Congress has clearly stated that they are jurisdictional, or there is a long tradition of treating them as jurisdictional. To determine whether Congress has clearly stated an intent that the prerequisite be jurisdictional, the Court has looked to the text of the prerequisite itself, as well as to whether it is located in the jurisdictional provision of the law in question. Where the text "does not speak in jurisdictional terms or refer in any way to

the jurisdiction of the district courts," *Arbaugh*, 546 U.S. at 515 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)), this Court has consistently held that Congress did not clearly state its intention to make the prerequisite jurisdictional.

Applying this standard, this Court has twice addressed the jurisdictional nature of *Title VII* statutory prerequisites, and both times held that the prerequisite at issue is not jurisdictional. In *Arbaugh v. Y & H Corp.*, this Court held that Title VII's limitation of covered employers to those with 15 or more employees—the employee-numerosity requirement—is not a jurisdictional prerequisite to filing suit. 546 U.S. at 504. First, the Court concluded that "[n]othing in the text of Title VII indicates that Congress intended courts, on their own motion, to assure that the employee-numerosity requirement is met." *Id.* at 514.

Second, the Court concluded that the structure of Title VII provided no indication that the employee-numerosity requirement was jurisdictional. Specifically, the Court explained that two provisions grant district courts jurisdiction over Title VII claims. 28 U.S.C. § 1331 grants federal courts subject-matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." And 42 U.S.C. § 2000e-5(f)(3) provides that "[e]ach United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter."[2]

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[2] When Title VII was passed, Section 1331 contained an amount-in-controversy requirement: claims could not be brought under Section 1331 unless the amount in controversy exceeded $10,000. 28 U.S.C. § 1331(a) (1964 ed.). Thus, Title VII's separate jurisdiction-conferring provision "assured that the amount-in-controversy limitation would not impede an employment-

Critically, the Court observed that "neither § 1331, nor Title VII's jurisdictional provision . . . specifies *any* threshold ingredient" for bringing suit. *Arbaugh*, 546 U.S. at 515 (emphasis added). The Court contrasted these provisions with 28 U.S.C. § 1332—the provision granting federal courts jurisdiction over diversity actions—which includes a jurisdictional "monetary floor." *Id.* "[T]he 15-employee threshold," by contrast, "appears in a separate provision that 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'" *Id.* (quoting *Zipes*, 455 U.S. at 394). The Court thus concluded that Congress had not "clearly state[d]" that the employee-numerosity requirement "shall count as jurisdictional." *Id.*

Similarly, in *Zipes v. Trans World Airlines, Inc.*, this Court held that Title VII's statutory time limit for filing an EEOC charge is not a jurisdictional prerequisite for filing suit in federal court. 455 U.S. at 393; *see Reed Elsevier*, 559 U.S. at 166 ("*Zipes* . . . held that Title VII's requirement that sex-discrimination claimants timely file a discrimination charge with the EEOC before filing a civil action in federal court was nonjurisdictional."). The Court explained that Title VII's jurisdiction-granting provision "does not limit jurisdiction to those cases in which there has been a timely filing with the EEOC"; "[i]t contains no reference to the timely-filing requirement." *Zipes*, 455 U.S. at 393-94; *see id.* at 393 n.9 (specifying that 42 U.S.C. § 2000e-5(f)(3) is Title VII's jurisdictional provision). Moreover, "[t]he provision specifying the time for filing

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discrimination complainant's access to a federal forum." *Arbaugh*, 546 U.S. at 505. Now that the amount-in-controversy threshold has been eliminated for federal claims, "Title VII's own jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3), has served simply to underscore Congress' intention to provide a federal forum for the adjudication of Title VII claims." *Id.* at 506.

charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 394. The Court acknowledged that its prior cases "contain scattered references to the timely-filing requirement as jurisdictional," but noted that "the legal character of the requirement was not at issue in those cases." *Id.* at 395.

The *Zipes* Court also placed weight on a prior case, *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), in which the Court held that certain unnamed class members in a Title VII suit who had not filed administrative charges with the EEOC could still remain part of a class in federal court. *Id.* at 771. As *Zipes* explained, "[i]f the timely-filing requirement were to limit the jurisdiction of the District Court to those claimants who have filed timely charges with the EEOC," the *Franks* district court "would have been without jurisdiction to adjudicate the claims of those [class members] who had not filed" before the EEOC first. 455 U.S. at 397. But this Court "did not so hold." *Id.* Instead, the Court held that "the provision for filing charges with the EEOC should not be construed to erect a jurisdictional prerequisite to suit in the district court." *Id.*

The outcomes of these two Title VII cases—holding that certain statutory prerequisites are mandatory but not jurisdictional—are mirrored in this Court's treatment of similar prerequisites in other statutory contexts. For instance, in *Reed Elsevier, Inc. v. Muchnick*, this Court held that the Copyright Act's requirement that copyright holders register their works before suing for copyright infringement "is a precondition to filing a claim that does not restrict a federal court's subject-matter jurisdiction." 559 U.S. at 157. The Copyright Act requires that "no civil action for infringement

of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title." 17 U.S.C. § 411(a). The Court concluded that this language does not "clearly state[]" that the registration requirement is jurisdictional. *Reed Elsevier*, 559 U.S. at 163 (quoting *Arbaugh*, 546 U.S. at 515). Moreover, "§ 411(a)'s registration requirement . . . is located in a provision 'separate' from those granting federal courts subject-matter jurisdiction" over copyright claims—namely, 28 U.S.C. §§ 1331 and 1338(a). *Id.* at 164-65.

Tellingly, the Court compared this registration requirement to "Title VII's requirement that sex-discrimination claimants timely file a discrimination charge with the EEOC before filing a civil action in federal court." *Id.* at 166. As the Court explained, "[a] statutory condition that requires a party to take some action before filing a lawsuit is not automatically 'a *jurisdictional* prerequisite to suit.'" *Id.* (quoting *Zipes*, 455 U.S. at 393). The Court also noted that it has "treated as nonjurisdictional other types of threshold requirements that claimants must complete, or exhaust, before filing a lawsuit," *id.*—citing *Jones v. Bock*, 549 U.S. 199 (2007), in which the Court held that the Prison Litigation Reform Act's administrative exhaustion requirement is an "affirmative defense," *id.* at 211.

Similarly, in *Henderson ex rel. Henderson v. Shinseki*, the Court held that a deadline for filing a notice of appeal with the U.S. Court of Appeals for Veterans Claims is not jurisdictional. 562 U.S. at 431. Even though the relevant statutory provision provides that "a person adversely affected by [a Board of Veterans' Appeals] decision shall file a notice of appeal with the Court [of Appeals for Veterans Claims] within 120

days after the date on which notice of the decision is mailed" "[i]n order to obtain review by the Court," 38 U.S.C. § 7266(a), this Court concluded that "[t]he terms of the provision . . . do not suggest, much less provide clear evidence, that the provision was meant to carry jurisdictional consequences," *Henderson*, 562 U.S. at 438. Though it is "true that § 7266 is cast in mandatory language," "'all mandatory prescriptions, however emphatic, are [not] . . . properly typed jurisdictional.'" *Id.* at 439 (quoting *Union Pacific R.R. Co. v. Locomotive Engineers and Trainmen Gen. Comm. of Adjustment, Central Region*, 558 U.S. 67, 81 (2009)). In short, "the language of § 7266 provides *no clear indication* that Congress wanted that provision to be treated as having jurisdictional attributes." *Id.* (emphasis added).

Moreover, as the Court also noted, "Congress elected not to place the 120-day limit" in the Veterans' Judicial Review Act's jurisdictional provision. *Id.* That provision grants the U.S. Court of Appeals for Veterans Claims "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals" and the "power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." 38 U.S.C. § 7252(a). "Nothing in this provision . . . addresses the time for seeking Veterans Court Review." *Henderson*, 562 U.S. at 439-40. Thus, the Court concluded that while the deadline for filing a notice of appeal is "an important procedural rule," it "does not have jurisdictional attributes." *Id.* at 441-42.

The only exception to this Court's clear-statement rule is when there is a long tradition of treating a particular requirement as jurisdictional. For instance, in *Bowles v. Russell*, 551 U.S. 205 (2007), the Court held that the statutory deadline for filing an appeal in a U.S. Court of Appeals is jurisdictional. *Id.* at 206-07.

The Court noted that it had "long held" that this limitation was jurisdictional, and that "even prior to the creation of the circuit courts of appeals, this Court regarded statutory limitations on the timing of appeals as limitations on its own jurisdiction." *Id.* at 209, 210. And this Court noted that "the courts of appeals routinely and uniformly dismiss untimely appeals for lack of jurisdiction." *Id.*

Similarly, in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), the Court held that the requirement that a lawsuit be filed in the Court of Federal Claims within six years of the time it accrues is jurisdictional. *Id.* at 132. Though acknowledging that "the law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver," *id.* at 133, the Court noted that it had held the requirement to be jurisdictional since at least 1883, *id.* at 134 (citing *Kendall v. United States*, 107 U.S. 123 (1883)), and therefore "[b]asic principles of *stare decisis* . . . require[d] [it] to reject this argument," *id.* at 139.

In short, outside of cases where a requirement has long been considered to be jurisdictional by this Court and others, this Court has consistently and strictly applied the clear-statement test to determine when a statutory prerequisite is jurisdictional. It should apply that same test here.

3. Petitioner understandably seeks to avoid the clear-statement rule, suggesting instead that the appropriate test is not whether Congress has "clearly stated" an intent to make a requirement jurisdictional, but rather whether Congress's intent to preclude district court jurisdiction was "fairly discernible in the statutory scheme." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994) (quoting *Block v. Cmty.*

Nutrition Inst., 467 U.S. 340, 351 (1984)); *see* Pet'r Br. 20. But the three cases on which Petitioner relies for this rule are entirely inapposite.

First, in *Thunder Basin Coal Company v. Reich*, this Court considered *not* whether an administrative exhaustion requirement is jurisdictional, but rather whether the Federal Mine Safety and Health Amendments Act's statutory scheme permits federal district courts to exercise jurisdiction over Mine Act–related claims *at all*. Under the Mine Act's scheme, the Secretary of Labor is empowered to compel compliance with the Act, and mines can challenge such enforcement before the Federal Mine Safety and Health Review Commission. 510 U.S. at 204. A decision of that Commission can then be reviewed *by a U.S. Court of Appeals*—not a district court—and "the jurisdiction of the court shall be exclusive and its judgment and decree shall be final," except for Supreme Court review. 30 U.S.C. § 816(a)(1).

Rather than proceed by way of the Commission and a U.S. Court of Appeals, however, the petitioner in *Thunder Basin* attempted to file a preenforcement action in federal district court, arguing that certain representatives of the miners' union who would observe the Secretary's inspection were not properly selected pursuant to the statute. 510 U.S. at 204-05. The Court held that the structure of the Act "demonstrates that Congress intended to preclude challenges" in district court because "[t]he Act's comprehensive review process does not distinguish between preenforcement and postenforcement challenges, but applies to all violations of the Act and its regulations." *Id.* at 208-09. Moreover, the Court noted legislative history in which "Congress expressly eliminated the power of a mine operator to challenge a final penalty assessment *de novo* in district court." *Id.* at 211. For those reasons,

the Court found a "'fairly discernible' intent to preclude district court review in the present case." *Id.* at 216 (quoting *Block*, 467 U.S. at 351).

Notably, the Court did *not* hold that the Mine Act's exhaustion requirement before the Commission was a jurisdictional prerequisite to suit in federal court. Rather, the Court held that it was fairly discernible that Congress intended for the district courts to *play no part* in the statutory scheme established by the Mine Act. In other words, federal district courts could never have jurisdiction over Mine Act claims. The Court never even addressed the distinction between claim-processing rules and jurisdictional prerequisites, let alone limited the clear-statement rule that governs that distinction.

Relatedly, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), the Court held that petitioners could bring a collateral constitutional challenge to the Board's structure in federal district court. *Id.* at 489. Again, what was at issue in *Free Enterprise Fund* was whether a certain type of claim could be brought as a stand-alone action in federal district court *at all*. The Court enunciated the same rule from *Thunder Basin*: "[p]rovisions for agency review do not restrict judicial review unless the 'statutory scheme' displays a 'fairly discernible' intent to limit jurisdiction, and the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure.'" *Id.* (quoting *Thunder Basin*, 510 U.S. at 207, 212). The Court concluded that the district court could exercise jurisdiction over petitioners' collateral constitutional claims, which were outside of the Commission's expertise. *Id.* at 490-91. In other words, the Court decided that a certain type of claim could be brought in federal district court, *not*

that a certain prerequisite was or was not jurisdictional.

Finally, in *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), the Court considered whether the Civil Service Reform Act of 1978 "provides the exclusive avenue to judicial review when a qualifying employee challenges an adverse employment action by arguing that a federal statute is unconstitutional." *Id.* at 5. Under the statutory scheme, federal employees ordinarily may obtain review of adverse employment actions before the Merit Systems Protection Board (MSPB), and then may appeal to the U.S. Court of Appeals for the Federal Circuit, which has "exclusive jurisdiction" over appeals from a final decision of the Board. 28 U.S.C. § 1295(a) & (a)(9). As in *Thunder Basin*, the plaintiff sought to avoid this statutory scheme altogether and file a claim that a particular provision is unconstitutional in federal district court.

The Court reasoned that the Act's "elaborate framework . . . indicates that extrastatutory review is not available to those employees to whom the [Act] grants administrative and judicial review." *Elgin*, 567 U.S. at 11 (quotations marks, citations, and emphasis omitted). Moreover, the Court concluded that "[n]othing in the [Act's] text suggests that its exclusive review scheme is inapplicable simply because a covered employee challenges a covered action on the ground that the statute authorizing that action is unconstitutional." *Id.* at 13. In short, constitutional claims by covered employees—like all other employment claims—must be brought to the Board and then the Federal Circuit, not to a district court.

Importantly, the *Elgin* Court actually *contrasted* the MSPB review scheme with EEOC review. The Court noted that "[w]hen a covered employee 'alleges that a basis for the action was discrimination'

prohibited by enumerated federal employment laws," the Civil Service Reform Act "allows the employee to obtain judicial review of an unfavorable MSPB decision by filing a civil action . . . in federal district court." *Id.* at 13 (quotation marks and citation omitted). The fact that Congress knew how to permit district court jurisdiction over certain types of employee claims—namely, Title VII claims—but did not provide an avenue to bring the plaintiff's constitutional claim in district court "indicate[d]" to the Court "that Congress intended no such exception." *Id.*

In short, *Thunder Basin*, *Free Enterprise Fund*, and *Elgin* applied the "fairly discernible" standard to a different question than the one at issue here. Those cases considered whether a particular statutory scheme permitted federal district court jurisdiction over certain types of claims at all. The Court did not consider in those cases whether a particular statutory prerequisite to bringing a district court claim is jurisdictional. *See* Resp. Br. 2 (noting that these cases "decide[] *which court* has jurisdiction, not *which requirements* are jurisdictional"). And it never limited the applicability of the clear-statement rule to that question. For those reasons, this Court should apply the clear-statement rule in this case, as it has done in all cases where the jurisdictional nature of a statutory prerequisite to filing suit is at issue.[3]

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[3] Other cases that Petitioner cites are good examples of "drive-by jurisdictional rulings" that this Court has insisted "have no precedential effect." *Steel Co.*, 523 U.S. at 91. For instance, in *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982), this Court observed that courts of appeals "lack[] jurisdiction to review objections" that are not initially presented to the NLRB. *Id.* at 666. However, whether presenting an argument to the NLRB before raising it in a court of appeals is truly a jurisdictional requirement was never at issue in that case. Similarly, in *McNeil v. United States*, 508 U.S. 106 (1993), the Court

II. CONGRESS HAS NOT CLEARLY STATED THAT TITLE VII'S EXHAUSTION REQUIREMENT IS JURISDICTIONAL.

For all the reasons that this Court has repeatedly held that other, similar statutory prerequisites are not jurisdictional, it should likewise hold that Title VII's exhaustion requirement is not jurisdictional.

First, the text of Title VII provides no indication—let alone a clear one—that Congress intended the exhaustion requirement to be jurisdictional. The exhaustion requirement says that if the EEOC dismisses a charge, fails to file a civil action, or has not entered into a conciliation agreement, the EEOC "shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(f)(1). This provision "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Zipes*, 455 U.S. at 394.

Second, the structure of Title VII also provides no indication that Congress intended the exhaustion requirement to be jurisdictional. Title VII's exhaustion requirement "is located in a provision 'separate' from those granting federal courts subject-matter jurisdiction over [such] claims." *Reed Elsevier*, 559 U.S. at 164 (quoting *Arbaugh*, 546 U.S. at 514-15). As described above, federal district courts have subject-matter jurisdiction over Title VII claims based on 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(3). But "neither

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referenced in passing a statutory exhaustion requirement under the Federal Tort Claims Act as a "necessary predicate[] to the invocation of the court's jurisdiction," *id.* at 111, even though the jurisdictional nature of the provision had no significance in the case.

§ 1331, nor Title VII's jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3) . . . specifies any threshold ingredient akin to 28 U.S.C. § 1332's monetary floor." *Arbaugh*, 546 U.S. at 515.[4] Thus, neither the text nor the structure of Title VII provides a clear indication that Congress intended the exhaustion requirement to limit the district court's subject-matter jurisdiction.

Third and finally, there is no long tradition of treating Title VII's exhaustion requirement as jurisdictional, as there was in *Bowles* and *John R. Sand & Gravel Company*. In fact, just the opposite. This Court has repeatedly suggested that Title VII's exhaustion requirement is not jurisdictional. As explained above, in *Zipes*, the Court specifically said that "the provision for filing charges with the EEOC should not be construed to erect a jurisdictional prerequisite to suit in the district court." 455 U.S. at 397. And in *Reed Elsevier*, the Court referred to *Zipes* as holding that "[a] statutory condition that requires a party to take some action before filing a lawsuit is not automatically 'a jurisdictional prerequisite to suit.'" 559 U.S. at 166 (quoting *Zipes*, 455 U.S. at 393). The Court went on to say that "[w]e similarly have treated as nonjurisdictional other types of threshold requirements that claimants must complete, *or exhaust*, before filing a lawsuit." *Id.* (emphasis added). On top of that precedent from this Court, eight courts of appeals have held

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[4] Petitioner claims that all of § 2000e-5(f) should be considered Title VII's jurisdictional provision, Pet'r Br. 42-43, but the only provision that actually speaks to jurisdiction is § 2000e-5(f)(3). No doubt that is why this Court has specifically referred to "§ 2000e-5(f)(3)" as "Title VII's jurisdiction-granting section." *Reed Elsevier*, 559 U.S. at 162; *see Arbaugh*, 546 U.S. at 515 (referring to § 2000e-5(f)(3) as "Title VII's jurisdictional provision" because it "authoriz[es] jurisdiction over actions 'brought under' Title VII").

that exhaustion under Title VII is not jurisdictional. *See* Cert. Opp. 14. Thus, rather than a tradition of treating this requirement as jurisdictional, there is a tradition of just the opposite.

Petitioner focuses on the important policy reasons that Congress chose to require claimants to go to the EEOC before proceeding to federal court, noting that Congress sought to encourage non-judicial resolution of employment discrimination claims, and that it wanted to permit the EEOC to bring its own enforcement actions in the public interest. Pet'r Br. 28-29. But this Court has rejected the notion that "a condition should be ranked as jurisdictional merely because it promotes important congressional objectives." *Reed Elsevier*, 559 U.S. at 169 n.9. In any event, those objectives would not be meaningfully hindered even if the exhaustion requirement were not jurisdictional. After all, claim-processing rules are "important and mandatory" even if they are not "given the jurisdictional brand." *Henderson*, 562 U.S. at 435. Holding that they are not jurisdictional simply means that a defendant cannot try his luck on the merits of a discrimination claim, lose those arguments at trial or on appeal, and then bring up an exhaustion defense for the first time years into the litigation—as Petitioner did in this case, *see* Pet. App. 14a (petitioner "waited five years and an entire round of appeals all the way to the Supreme Court before it argued that Davis failed to exhaust").

Holding that the exhaustion requirement is not jurisdictional is also not likely to be of much consequence in most discrimination cases. Indeed, this issue will be relevant "only when the defendant has waived or forfeited the issue." *McQueen ex rel. McQueen v. Colo. Spring Sch. Dist. No. 11*, 488 F.3d 868, 873 (10th Cir. 2007). And employers are typically sophisticated

parties who are unlikely to forget to raise such an obvious defense. Petitioner speculates that defendants may purposely choose not to raise this defense because they would prefer that cases not be presented to the EEOC. Pet'r Br. 30. But Petitioner offers absolutely no evidence that this type of gamesmanship occurs in the eight circuits that have already held that the exhaustion requirement is not jurisdictional. Indeed, the substantial costs associated with federal court litigation likely explain why it has not.

In short, "[g]iven the unfairness and waste of judicial resources entailed in tying the [exhaustion] requirement to subject-matter jurisdiction," it is "the sounder course to refrain from constricting § 1331 or Title VII's jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3), and to leave the ball in Congress' court." *Arbaugh*, 546 U.S. at 515 (citation and quotation marks omitted). Because Congress has not "clearly state[d]" that the requirement "shall count as jurisdictional," *id.*, this Court should not treat it as such.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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April 3, 2019

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No. 18-525

IN THE

Supreme Court of the United States

FORT BEND COUNTY, TEXAS,

Petitioner,

v.

LOIS M. DAVIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PROFESSOR SCOTT DODSON AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*

I am the Geoffrey C. Hazard Jr. Distinguished Professor of Law at the University of California Hastings College of Law, where I teach and write on federal jurisdiction and civil procedure. I have an academic and pedagogical interest in the clarification of the boundaries, scope, and regulatability of federal jurisdiction. On that basis, I submit this short brief in support of neither party to aid the Court's consideration of these issues.[1]

SUMMARY OF ARGUMENT

The precise question confronting the parties on this appeal is:

> Did the district court err in dismissing the Respondent's claim for failure to exhaust when the Petitioner did not timely assert an exhaustion defense?

That question can and should be answered directly by resort to statutory construction, common-law traditions, and administrative policy.

Rather than answering this question directly, the parties and courts below have focused on a different question: whether Title VII's exhaustion requirement is jurisdictional. But resolving this jurisdictional issue does not answer the question confronting the parties. This Court should answer the question confronting the parties without resolving whether the exhaustion requirement is jurisdictional.

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[1] My institutional affiliation is provided for identification purposes only. No counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund its preparation or submission. All parties have filed blanket consents to amicus briefs.

ARGUMENT

THE COURT SHOULD DECIDE THIS CASE WITHOUT RESOLVING THE JURISDICTIONAL CHARACTER OF SECTION 2000e-5.

1. More than two decades ago, this Court, concerned that jurisdiction "is a word of many, too many, meanings," embarked on a mission to bring clarity to jurisdictional doctrine. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (quotation cleaned up). Subsequent opinions have brought new attention and thinking to questions of jurisdiction. *See, e.g.*, *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13 (2017); *United States v. Wong*, 135 S. Ct. 1625 (2015); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145 (2013); *Gonzalez v. Thaler*, 565 U.S. 134 (2012); *Henderson v. Shinseki*, 562 U.S. 428 (2011); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008); *Bowles v. Russell*, 551 U.S. 205 (2007); *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006); *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam), *Scarborough v. Principi*, 541 U.S. 401 (2004); *Kontrick v. Ryan*, 540 U.S. 443 (2004).

2. At times, this Court has taken a jurisdiction-first approach of deciding the jurisdictional character of a rule in order to define its effects. In *Bowles*, for example, the Court held that the deadline to file a notice of appeal in a civil case is jurisdictional and therefore not subject to equitable exceptions. *Bowles*, 551 U.S. at 212-14. The Court engaged no separate analysis of the deadline's effects; the jurisdictional holding automatically led to the determination that equitable exceptions were not allowed.

This jurisdiction-first approach assumes that jurisdictional rules have immutable and defined characteristics, namely, that they are not subject to principles of equity, discretion, estoppel, forfeiture, consent, or waiver, and courts must police them sua sponte at all times prior to final judgment.

The jurisdiction-first approach also assumes that nonjurisdictional rules have (at least presumptively) the inverse effects of jurisdiction. *See, e.g., Day v. McDonough*, 547 U.S. 198, 205 (2006) ("A statute of limitations defense . . . is not 'jurisdictional,' hence courts are under no *obligation* to raise the time bar sua sponte.") (original emphasis); *id.* at 213 (Scalia, J., dissenting) (stating that ordinary time-bar defenses "are nonjurisdictional and thus subject to waiver and forfeiture").

These assumptions underlying the jurisdiction-first approach are flawed. In truth, the jurisdictional characterization of a rule does not inexorably define its effects.

3. The flaw is easier to appreciate with nonjurisdictional rules. Nonjurisdictional rules can have effects typically associated with jurisdictional rules, such as being nonwaivable or unsusceptible to equitable exceptions. *See* Scott Dodson, *Mandatory Rules*, 61 Stan. L. Rev. 1, 6 (2008).

Indeed, although exhaustion requirements are often treated as nonjurisdictional preconditions to suit, those exhaustion requirements nevertheless often exhibit jurisdiction-like effects. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 684 (1984) ("We agree with the Court of Appeals that the [habeas] exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not

jurisdictional."); *Granberry v. Greer*, 481 U.S. 129, 133 (1987) (holding that appellate courts have discretion to consider a habeas petitioner's failure to exhaust even if the State did not assert the defense); 28 U.S.C. § 2254(b)(3) (providing that the habeas exhaustion requirement cannot be forfeited by the State); *Jones v. Bock*, 549 U.S. 199, 211-16 (2007) (holding the PLRA's exhaustion requirement to be mandatory but an affirmative defense that must be asserted in the answer).

The point is that nonjurisdictional rules—including nonjurisdictional exhaustion requirements—can have jurisdiction-like effects that might make them nonforfeitable or mandatory. *E.g.*, *Nutraceutical Corp. v. Lambert*, No. 17-1094, slip op. at 4 (2019) ("Whether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the text of the rule leaves room for such flexibility.").

4. Although harder to appreciate, the flip side is true as well: jurisdictional rules can have nonjurisdictional effects, in myriad ways. *See* Scott Dodson, *Hybridizing Jurisdiction*, 99 Calif. L. Rev. 1437 (2011).

Most pertinent to this case is the species of jurisdictional preconditions, in which an event or action is required to confer jurisdiction. Though such a precondition is a predicate to jurisdiction, the precondition itself need not be unwaivable or incurable or inexcusable. *Id.* at 1463-65.

For example, although a timely notice of appeal is required to confer appellate jurisdiction in a civil case, *Bowles*, 551 U.S. at 214, what constitutes an effective "notice" is subject to judicial discretion,

Becker v. Montgomery, 532 U.S. 757, 765 (2001) (allowing an appellant to correct a defective notice of appeal); *Smith v. Barry*, 502 U.S. 244, 245 (1992) (treating an appellate brief as a notice of appeal); *Foman v. Davis*, 371 U.S. 178, 181 (1962) (deeming a notice of appeal from the denial of a motion to vacate to be a notice of appeal from the underlying judgment). Similarly, although the issuance of a certificate of appealability in a habeas case is a precondition to appellate jurisdiction, *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), what constitutes an effective certificate of appealability is a nonjurisdictional question, *Gonzalez*, 565 U.S. at 143-45 ("A defective COA is not equivalent to the lack of any COA.").

This Court has characterized some exhaustion requirements as prerequisites to jurisdiction, but that characterization has not automatically conferred all of the usual attributes of jurisdictionality upon the exhaustion requirement itself. For example, the statutory requirement that social-security claimants receive a final decision from the Social Security Commissioner before filing a claim in federal court, *see* 42 U.S.C. § 405(g), is a "jurisdictional prerequisite" that contains "a waivable element [that] the administrative remedies provided by the [Commissioner] be exhausted." *Matthews v. Eldridge*, 424 U.S. 319, 327-30 (1976); *see also Heckler v. Day*, 467 U.S. 104, 110 n.14 (1984) ("The jurisdictional requirement that administrative remedies be exhausted is waivable."). A claimant's failure to comply with this waivable part of the exhaustion requirement is also excusable by the courts even absent the Commissioner's waiver. *Bowen v. City of New York*, 476 U.S. 467, 484-86 (1986).

5. The teaching of these cases is that the jurisdictional characterization of an exhaustion requirement does not conclusively determine whether an exhaustion defect can be cured, or forfeited, or enforced by a district court despite party forfeiture.

For that reason, resolving the jurisdictional character of 42 U.S.C. § 2000e-5's exhaustion requirement will not resolve whether the district court correctly dismissed the Respondent's unexhausted claim. If the exhaustion requirement is a jurisdictional precondition, it might still be forfeitable or excusable or curable. If the exhaustion requirement is nonjurisdictional, it might still be mandatory or enforceable despite the circumstances. Resolving the jurisdictional issue simply does not answer the real question confronting the parties: whether the district court was correct to dismiss for failure to exhaust.

6. Rather than take a jurisdiction-first approach, this Court should take an effects-based approach that avoids the jurisdictional issue and instead construes the effects of the rule directly. This Court has taken such an approach before. In *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), the Court was presented with the question of whether RCRA's 60-day notice requirement was a limit on federal subject-matter jurisdiction. However, the Court declined to answer that question and instead answered the narrow question presented by the facts of the case: whether the requirement was amenable to equitable exceptions. *Id.* at 31. The Court answered that question directly without addressing the jurisdictional character of the notice requirement.

Likewise, the petition for certiorari in *John R. Sand* asked this Court to decide "[w]hether the statute of limitations in 28 U.S.C. § 2501 limits the subject matter jurisdiction of the Court of Federal Claims." Pet. Br. at i, *John R. Sand & Gravel Co. v. United States*, No. 06-1164, 2007 WL 2236607 (Aug. 3, 2017). The precise issue in that case, however, was whether a court must enforce the limitations period even if the United States, as a party-defendant, waives the issue. In its opinion, the Court rephrased the question presented to reflect these terms and resolved that issue alone. *John R. Sand*, 552 U.S. at 132. In the process, this Court carefully avoided characterizing the limitations period as jurisdictional or nonjurisdictional. *Id.* at 133-35 (characterizing the time bar as a "more absolute" bar that justifies departure from usual waiver rules); *cf. id.* at 134 (suggesting that prior cases' use of the term "jurisdictional" was "[a]s convenient shorthand").

7. This Court should take the approach of *Hallstrom* and *John R. Sand* in deciding this case. That effects-based approach, unlike a jurisdiction-first approach, will answer the narrow and precise question actually at hand: whether the district court erred in dismissing the Respondent's complaint for lack of exhaustion despite the Petitioner's failure to timely raise the exhaustion issue.

This brief does not urge a particular answer to that question. Perhaps the importance of Title VII exhaustion justifies the district court's dismissal despite the Petitioner's forfeiture or any considerations of equity. Perhaps the preference for party autonomy means that the Petitioner's forfeiture disables the district court from dismissing for lack of

exhaustion. Perhaps the Respondent's exhaustion of her related sexual-harassment and retaliation claims should, under the circumstances, be deemed effective exhaustion of her religious-discrimination claim. Perhaps the district court should have exercised discretion to stay the case to allow the Respondent an opportunity to exhaust the religious-discrimination claim.

The right answer will depend upon ordinary principles of statutory construction, common-law traditions, and administrative policy. It need not—should not—depend upon jurisdictional classification.

CONCLUSION

For these reasons, this Court should determine the effect of Title VII's exhaustion requirement in this case without regard to the exhaustion requirement's jurisdictional status.

Respectfully submitted,

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No. 18-525

IN THE

Supreme Court of the United States

FORT BEND COUNTY,

Petitioner,

v.

LOIS M. DAVIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF RESPONDENT

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April 3, 2019

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INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights legal organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights.

Since the enactment of the Civil Rights Act of 1965, LDF has helped Americans vindicate their rights under Title VII by means of its private right of action.[2] LDF represented plaintiffs in cases such as, *inter alia*, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), and *Lewis v. City of Chicago*, 560 U.S. 205 (2010). LDF has also filed *amicus* briefs in this Court in important Title VII cases such as *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), and *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). LDF

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel for *amicus curiae* state that both parties have filed blanket consent to the filing of *amicus briefs*.

[2] *See, e.g.*, Jack Greenberg, *Crusaders in the Courts* 412–29 (1994).

has a strong interest in the proper interpretation and application of Title VII.

INTRODUCTION AND SUMMARY OF ARGUMENT

Title VII is an essential part of one of our nation's most important civil rights laws, the Civil Rights Act of 1964.[3] It is designed to ensure that employment opportunities—the key for most Americans to economic security and social mobility—are not limited by a person's race, religion, sex, or national origin. Title VII's private right of action is central to achieving this goal, and private plaintiffs have played a major role in enforcing the statute.[4] That was Congress's expectation and intent. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523 (1994).

In crafting the private right of action, Congress chose to create statutory preconditions for that aspect of Title VII. This case involves the precondition mandating that plaintiffs file a charge with the Equal Employment Opportunity Commission (EEOC). No one questions that the requirement is in fact a requirement, or that it serves useful purposes. The issue is whether Congress meant to condition the judiciary's ability to exercise its power on strict compliance with this requirement, even if an employer does not raise it as a defense. Every relevant indication suggests that Congress did not.

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[3] *See, e.g.*, Berta E. Hernandez, *Title VII v. Seniority: The Supreme Court Giveth and the Supreme Court Taketh Away*, 35 Am. U. L. Rev. 339, 344 & n.31 (1986) (citing B. Schlei & P. Grossman, *Employment Discrimination Law* vii (2d ed. 1983)).

[4] *See, e.g.*, Greenberg, *supra* note 2, at 412–29 (describing LDF's work representing private plaintiffs in the early years of Title VII).

Congress knew, and this Court has recognized, that unschooled nonlawyers would often be tasked with satisfying Title VII's statutory preconditions. Classifying those preconditions as jurisdictional can have severe results for those private parties' access to justice and their ability to carry out the responsibility that Congress tasked them with as private attorneys general. And, the incorrect classification of a rule as jurisdictional creates a risk of sandbagging and places unwarranted burdens on the lower courts.

"[P]rocedural rules . . . cabin a court's power only if Congress has clearly state[d] as much." *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) (internal quotation marks and citation omitted) (second alteration in original). That mandate applies with special force to a statutory scheme aimed at providing all Americans with access to the courts to defend themselves from discrimination at work. The Court should affirm that principle and affirm the court below.

ARGUMENT

I. ACCESS TO A ROBUST PRIVATE RIGHT OF ACTION IS INTEGRAL TO TITLE VII'S EFFECTUATION.

A. Congress Fashioned the Private Right of Action as a Primary Mechanism for Compelling Compliance with Title VII.

Of the many ways racism has blighted our democracy, economic and employment-based injustice

and exclusion rank among the most pervasive.[5] Slavery involved the unadulterated theft of African American labor.[6] Even in the non-slave states, antebellum African Americans were relegated to "menial employment in service positions[.]"[7] After the Civil War, the reign of terror that swept the South was motivated, in part, by a desire to ensure a racialized employment hierarchy that forced African Americans "into the least remunerative and lowest-status employment sectors."[8] In the leadup to the Civil Rights Act of 1964, it was clear that African Americans "would never be free and equal citizens" if private discrimination—e.g., employment discrimination—continued unchecked.[9] It was no accident that the famed 1963 March on Washington was titled, in full, the "March on Washington for Jobs and Freedom."[10]

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[5] *See, e.g.*, Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 Fla. L. Rev. 251, 262–67 (2011) [hereinafter *A Social Movement History*].

[6] *See, e.g.*, Eric Foner, *Remarks at the Conference on the Second Founding November 14, 2008*, 11 U. Pa. J. Const. L. 1289, 1292 & n.13 (2009) (quoting President Lincoln's Second Inaugural).

[7] Susan D. Carle, *How Myth-Busting About the Historical Goals of Civil Rights Activism Can Illuminate Future Paths*, 7 Stan. J. Civ. Rts. & Civ. Liberties 167, 169 (2011) [hereinafter *Myth-Busting*]; *see also A Social Movement History*, *supra* note 5, at 262 & n.63.

[8] *A Social Movement History*, *supra* note 5, at 263 & n.65; *see also Myth-Busting*, *supra* note 7, at 169–71 (observing racist economic exclusion in South and North).

[9] Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. Rev. 1801, 1834 (2010).

[10] *Id.* at 1833 (observing that the full name was "a reference to private employment discrimination").

Against that backdrop, Congress included Title VII in the Civil Rights Act of 1964, "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). To accomplish that goal, Congress selected "private attorney[s] general" as its "chosen instrument[s.]" *Fogerty*, 510 U.S. at 523 (first alteration in original) (internal quotation marks and citations omitted); *see also N.Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980). Accordingly, in its earliest form Title VII included the private right of action Respondent employed here, *see Alexander*, 415 U.S. at 45.

This choice was critical. The administrative agency created as part of Title VII—the EEOC—initially lacked power either to bring suit or issue binding orders to employers.[11] This was a deliberate choice, the product of key congressmembers' demand that the EEOC not follow the model of the National Labor Relations Board, i.e., an agency with the power to issue final decisions to which the courts would defer substantially.[12] Rather than grant the EEOC ultimate adjudicatory authority over employment discrimination allegations, Congress instead chose to leave "final responsibility for enforcement of Title VII" with the federal courts, principally via de novo

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[11] *See* Stephanie Bornstein, *Rights in Recession: Toward Administrative Antidiscrimination Law*, 33 Yale L. & Pol'y Rev. 119, 127–28 (2014)

[12] *See id.* at 127; Sean Farhang, *The Political Development of Job Discrimination Litigation, 1963–1976*, 23 Stud. Am. Pol. Dev. 23, 32–33 (2009).

suits brought by private parties. *Alexander*, 415 U.S. at 44; *see also Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 824 n.4 (1990); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 469–70 & n.7 (1982); *Alexander*, 415 U.S. at 60 & n.21.[13] Congress showed its commitment to this path by granting courts authority to waive filing fees and appoint counsel for plaintiffs, and providing for attorney's fees to winning plaintiffs—all departures from the baseline rules.[14] In the years following 1964, private parties relying on the private right of action worked a transformation "almost on par with the campaign that won *Brown* [*v. Board of Education*, 347 U.S. 483 (1954)]."[15]

To be sure, Title VII does not work only through litigation. In fact, Congress sought to make "cooperation and voluntary compliance" the "preferred means" of achieving the statute's goals. *Alexander*, 415 U.S. at 44. To that end, Congress established procedures to aid and guide conciliation. Among other things, it established statutory preconditions for access to the private right of action, including the charge-filing requirement at issue here. *See* Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, 260, § 706(e) (1964). Despite one set of amendments to its operation, that requirement

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[13] *See also* Bornstein, *supra* note 11, at 126–28. The only exception was that the Attorney General could sue employers who exhibited a "pattern or practice of resistance" to the rights Title VII secured. *See* Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L. Rev. 431, 452 & n.90 (citing Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, 261, § 707(a) (1964)).

[14] *See* Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, 260–61, § 706(e), (k) (1964); Farhang, *supra* note 12, at 37–38.

[15] Greenberg, *supra* note 2, at 412.

effectively works today as it did in 1964. As it did then, it requires the putative plaintiff to file a charge stemming from an unlawful employment practice within a certain amount of time. If the EEOC dismisses the charge, or if within a certain time period the EEOC has neither "entered into a conciliation agreement" to which the aggrieved person is party nor filed suit[16] on the charge, the statute requires the EEOC to notify[17] the charge filer of the right to sue the entity named in the charge, at which point the individual may sue. 42 U.S.C. § 2000e-5(f)(1).[18]

Like the other presuit requirements, the charge-filing requirement at bottom works to "give the [EEOC] a chance to investigate the charge and decide whether to sue" (ever since the 1972 amendments gave it that power) and "to encourage the complainant and the employer, with or without [a] state agency's

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[16] In a case involving a governmental entity, the Attorney General is the entity with the option of filing suit. *See* 42 U.S.C. § 2000e-5(f)(1).

[17] In a governmental-entity case, the Attorney General has the notification responsibility. *See* 42 U.S.C. § 2000e-5(f)(1).

[18] Title VII's 1972 amendments changed the post-charge events necessary to trigger the notification to the charge filer. Originally the private charge filer was able to obtain the notification if the EEOC was unable to "obtain voluntary compliance" within a particular time period. *See* Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, 260, § 706(e) (1964). The current mechanism stems from the 1972 amendments. *See* Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, 105–06 (1972) (establishing steps now found in 42 U.S.C. § 2000e-5(f)(1)). The underlying principle did not change: if enough time passes and the situation remains unresolved from the employee's perspective, he or she should be able to sue. *See* Bornstein, *supra* note 11, at 128.

or the EEOC's assistance, to resolve their dispute informally." *Doe v. Oberweis Dairy*, 456 F.3d 704, 708 (7th Cir. 2006). But Congress was not naïve; conciliation and cooperation cannot eradicate all deep-rooted bias. Sometimes compliance must be compelled. The presuit requirements contemplate that conciliation may not resolve the issues on the table, and they permit an individual who has filed a charge to exit the process based on nothing more than their preference and the passage of time. *See Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 365–66 (1977) (agreeing that the "private right of action . . . is designed to make sure that the person aggrieved does not have to endure lengthy delays" caused by the EEOC and works to ensure a remedy where there is "agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution" (citation omitted)); *see also supra* note 18.

Title VII's major amendments have reiterated the private right of action's importance. Thus, while the 1972 amendments gave the EEOC authority to sue on a charge if it chose and increased some of its investigative power (while still denying it the power to issue binding orders), that increase in EEOC power "was intended to supplement, not replace, the private action." *General Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 326 (1980); *see also Alexander*, 415 U.S. at 44–45. Indeed, Congress declined to adopt proposals to eliminate or weaken the private right of action during the debates leading up to the 1972 amendments.[19] During those debates, proponents of

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[19] Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and*

robust civil rights enforcement like LDF Director-Counsel Jack Greenberg emphasized that the private right of action was "essential" to Title VII's operation.[20] It was ultimately retained, and "remain[ed] . . . essential" to Title VII's operation. *Alexander*, 415 U.S. at 45; *see also EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 n.21 (1981) (observing that the 1972 amendments provided a "strong reaffirmation of the importance of the private right of action in the Title VII enforcement scheme").

For their part, the 1991 amendments to Title VII "doubled down on [Congress's] reliance on private lawsuits as the primary means of enforcing the Act."[21] Faced with evidence that meritorious private cases were not being brought because of a dearth of counsel to prosecute them,[22] Congress sought to strengthen private remedies to encourage the private bar to represent private plaintiffs.[23]

Today, in keeping with Congress's original plan, private suits continue to be the primary means of enforcing Title VII.[24] As this Court observed in 1974, "Congress . . . thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims." *Alexander*, 415

Administration of the Law, 2 Berkeley J. Emp. & Lab. L. 1, 35–38 (1977); Farhang, *supra* note 12, at 44.

[20] Hill, *supra* note 19, at 37 (citation omitted).

[21] Bornstein, *supra* note 11, at 129.

[22] *See* Sean Farhang, *Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991*, 6 J. Empirical Legal Stud. 1, 12–13 (2009).

[23] Bornstein, *supra* note 11, at 129, 131.

[24] *See id.* at 130 (plaintiffs file over 50 times as many lawsuits as the EEOC manages to file).

U.S. at 60 n.21. And it remains "the duty of courts to assure the full availability of [that] forum." *Id.*

B. The History, Purpose, and Role of Title VII's Private Attorneys General Confirm that Presuit Filing Requirements Are Not Jurisdictional.

This case is about how Congress intended to condition access to the judicial forum and the effect—if any—it intended a private person's noncompliance with presuit conditions to have on judicial power to hear Title VII cases, even when they are not timely raised by a defendant. This Court has long understood that the history and purpose of Title VII shape that inquiry. *See, e.g., Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

Here, the importance of private attorneys general in enforcing Title VII weighs against interpreting presuit filing requirements as jurisdictional. Lay people generally initiate Title VII's machinery without legal aid. *See id.* at 397; *Huri v. Office of the Chief Judge of the Circuit Court of Cook Cty.*, 804 F.3d 826, 831 (7th Cir. 2015) ("Most EEOC charges are . . . drafted by laypersons rather than lawyers[.]"). Congress knew, moreover, that these laypersons would often be unschooled relative to the average civil litigant. *See Castner v. Colo. Springs Cablevision*, 979 F.2d 1417, 1421 (10th Cir. 1992) ("Title VII actions more often than not pit[] parties of unequal strength and resources against each other. The complainant, who is usually a member of a disadvantaged class, is opposed by an employer who not infrequently is one of the nation's major producers, and who has at his disposal a vast array of resources and legal talent."

(quoting H.R. Rep. No. 238, 92d Cong., 2d Sess., reprinted in 1972 U.S.C.C.A.N. 2137, 2148)).[25]

The potential difficulties for a lay attorney general seeking to fully comply with Title VII's charge-filing requirement underscores the impropriety of calling it jurisdictional. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513–15 (2006) (looking to the "consequences" and potential "unfair[ness]" of typing a Title VII rule jurisdictional (alteration in original) (citation omitted)). Here, before filing suit, Respondent wrote "Religion" in the "Other" box in the section of the Texas employment-discrimination agency's questionnaire captioned "Employment Harms or Actions." J.A. 71, 89–90. The signature box of that questionnaire described the document as a "charge" that would "be filed with . . . the EEOC[.]" *Id.* 90. It is not hard to imagine a reasonable nonlawyer believing this met the statutory requirement.[26] Without more, that might not excuse noncompliance, but it ought to be relevant to a court's decision whether (for example) a defendant who raises noncompliance late in the day can achieve dismissal.

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[25] Recent statistics support this analysis. A 2012 study found that more than 20% of plaintiffs filing discrimination claims in court represent themselves at the time of filing. Amy Myrick et. al., *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. Legis. & Pub. Pol'y 705, 714 & tbl. 1(2012). Those numbers are surely more pronounced at the presuit filing stage. What's more, race plays a role, with African American plaintiffs nearly three times as likely as white plaintiffs to represent themselves when filing discrimination lawsuits. *Id.*

[26] Whether Respondent in fact failed to meet the requirement remains a disputed question not presented for this Court's decision. *See* Resp. Br. at 46 n.17. The point is that what compliance entails may not be obvious to a nonlawyer.

After all, the "general consensus" that "courts may not consider bases of discrimination that are not asserted in the charge" is one that "courts generally have applied . . . flexibly, as a condition precedent[.]" II Linderman et al., *Employment Discrimination Law* 29-28 to 29-30 (5th ed. 2012).

Worse, the harsh jurisdictional rule Petitioner seeks would affect plaintiffs beyond this context. Consider, for example, a complainant who believes she was retaliated against because of her race. A lay complainant should not be expected to have the mastery of Title VII's legal categories that would ensure that her charge's description of her experience parses out those categories, or that she checks *both* "race" and "retaliation" on a given checkbox array. But under Petitioner's rule, her failure to do so may have created a snare that could require her case's dismissal, despite any considerations of equity or judicial efficiency. As Respondent points out, Petitioner would transform the myriad ways that a defendant might question a charge's "adequacy" into jurisdictional issues. Resp. Br. at 32–33. Given the potential complexity of these questions, and the prevalence of lay filers, it is unreasonable to conclude that Congress meant to strip the courts of the power to make equitable considerations in terms of burden, fairness, and efficiency when analyzing charge filings. On the contrary, the remedial purpose of Title VII requires that courts retain the power to employ equitable considerations in determining whether a party has met its statutory requirements. *See Zipes*, 455 U.S. at 397–98.

The informal and reconciliation-minded EEOC process may benefit victims of discrimination by

affording a venue for relief before they reach litigation. But when they come to court, an unwarranted jurisdictional gloss on Title VII's charge-filing provisions may strip them of a fair chance to vindicate their rights under the statute by allowing an employer to raise the issue even after years of litigation, discovery, dispositive motions, and even appeals. That result at least undoes years that a plaintiff may have invested in seeking a remedy. While always wasteful, this sort of delay is "especially unfortunate" in the Title VII context, where "[t]he claimant cannot afford to stand aside while the wheels of justice grind slowly toward . . . ultimate resolution[.]" *Ford Motor Co. v. EEOC*, 458 U.S. 219, 221 (1982).

Nothing in the statute indicates, let alone clearly, that Congress meant to allow such interference with the enforcement of Title VII by private plaintiffs. *See Kwai Fun Wong*, 135 S. Ct. at 1632 (recognizing that a "procedural rule[]" can be jurisdictional "only if" Congress clearly indicates it as such); *United States v. Spaulding*, 802 F.3d 1110, 1129 (10th Cir. 2015) (Gorsuch, J., dissenting) ("[W]e should read legislation as 'cabin[ing] a court's power'—its jurisdiction—'only if Congress has clearly stated as much.'" (quoting *Kwai Fun Wong*, 135 S. Ct. at 1632) (second alteration in original)). The Court can affirm that a charge is statutorily required without imposing this severe result.

II. RELATED TITLE VII PROVISIONS CONFIRM THAT THE CHARGE-FILING REQUIREMENT IS NONJURISDICTIONAL.

Statutory context matters. *See, e.g., Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168 (2010) ("[C]ontext, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional."). Judicial treatment of the most closely related Title VII provisions confirms the charge-filing requirement is not jurisdictional.

First, consider *Zipes*, which, at a minimum, held that timely filing a charge was nonjurisdictional. *See* 455 U.S. at 393. And, in addressing the specific issue of timeliness, the Court stated even more broadly that "Congress necessarily adopted the view that the provision for filing charges with the EEOC should not be construed to erect a jurisdictional prerequisite to suit in the district court." *Id.* at 397. Later cases describing *Zipes* have picked up on that principle. *See Reed Elsevier, Inc.*, 559 U.S. at 169 n.8 ("[O]ur holding in *Zipes* [was] that Title VII's EEOC filing requirement was nonjurisdictional[.]"); *Union Pac. Ry. Co. v. Bhd. of Locomotive Engineers*, 558 U.S. 67, 83 (2009) ("[P]resuit resort to the EEOC [was] held forfeitable in *Zipes*[.]"). This is inconsistent with Petitioner's desired distinction between timely filing and filing a charge at all. *See* Pet'r Br. at 34. Even if the distinction could be drawn, Petitioner's interpretation would create the anomalous result of Title VII containing two intricately interwoven charge requirements, one of which is jurisdictional and one of which is not. These directives to the individual—file a charge, and ensure it is timely—

seem to "speak" equally "to the rights or obligations" of that individual, which should render them both nonjurisdictional "'claim-processing'" rules. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1158 (10th Cir. 2013) (Gorsuch, J., concurring) (quoting *Reed Elsevier*, 559 U.S. at 161), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

The other major presuit requirement is the "giving of [a] notice" (i.e., the "right-to-sue letter") by the EEOC (or Attorney General in a case involving a governmental entity) that the EEOC has dismissed the charge, failed to reach a conciliation agreement to which the aggrieved person is party, or failed to sue the party named in the charge. 42 U.S.C. § 2000e-5(f)(1).[27] The lower courts that have addressed the issue have held this requirement not to be a jurisdictional prerequisite.[28] Those courts have

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[27] The Attorney General, rather than the EEOC, is granted the power to sue in cases involving governmental entities. 42 U.S.C. § 2000e-5(f)(1).

[28] *See Martinez-Rivera v. Puerto Rico*, 812 F.3d 69, 77–78 (1st Cir. 2016) (Americans with Disabilities Act case incorporating Title VII's presuit provisions); *Pietras v. Bd. of Fire Comm'rs of Farmingville Fire Dist.*, 180 F.3d 468, 474 (2d. Cir. 1999); *Gooding v. Warner-Lambert Co.*, 744 F.2d 354, 358 (3d. Cir. 1984); *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 679–80 (5th Cir. 1985); *Rivers v. Barberton Bd. of Educ.*, 143 F.3d 1029, 1031–32 (6th Cir. 1998); *Worth v. Tyler*, 276 F.3d 249, 259 (7th Cir. 2001); *Jones v. Am. State Bank*, 857 F.2d 494, 499–500 (8th Cir. 1988); *Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1104–05 (9th Cir. 2008); *Forehand v. Fla. State Hosp. at Chattahoochee*, 89 F.3d 1562, 1569–70 & n.17 (11th Cir. 1996); *Williams v. WMATA*, 721 F.2d 1412, 1418 n.12 (D.C. Cir. 1983) (per curiam). The Fourth Circuit's law is harder to categorize. Beginning in a 1982 case (which did not cite *Zipes*), it has said that "entitlement" to a right-to-sue letter is jurisdictional although its "issuance or

understood *Zipes* properly: as establishing a broad interpretive principle for Title VII's presuit requirements. For example, many explicitly invoke *Zipes*'s methodology, *see* 455 U.S. at 393–94, in asking whether Title VII's jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3), contains or refers to the right-to-sue requirement (it does not). *See, e.g.*, *Martinez-Rivera v. Puerto Rico*, 812 F.3d 69, 77 (1st Cir. 2016); *Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1104 (9th Cir. 2008); *Rivers v. Barberton Bd. of Educ.*, 143 F.3d 1029, 1032 (6th Cir. 1998); *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 680 (5th Cir. 1985). The law here is sufficiently clear for a leading treatise to state simply that "[c]ourts have not treated [receipt of the right-to-sue letter] as a jurisdictional prerequisite to suit under Title VII[.]" Linderman et al., *supra*, at 29-9.

Petitioner's *amici* miss the mark in suggesting otherwise. *See* Br. *Amici Curiae* of the Center for Workplace Compliance, National Federation of Independent Business Small Business Legal Center, Chamber of Commerce of the United States of America, and National Retail Federation at 10, 12, 18. Indeed, *amici* inadvertently undermine their argument by citing *Mach Mining* to support it. *See id.* at 12 (citing *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015)). On the page of that opinion *amici*

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receipt" is not—a holding based on considerations of "equity" and statutory "polic[y]." *Perdue v. Roy Stone Transfer Corp.*, 690 F.2d 1091, 1091, 1093–95 (4th Cir. 1982). This "entitlement" rule arguably crafts an equitable exception to a statutory provision that asks whether the letter has been "giv[en][,]" 42 U.S.C. § 2000e-5(f)(1). Its references to "jurisdiction" may be best explained as one of the formerly prevalent "drive-by jurisdictional ruling[s]" that this Court has worked to eradicate. *Arbaugh*, 546 U.S. at 511 (citation omitted).

cite, this Court first explained that plaintiffs may sue under Title VII "only if" they have "first filed a timely charge" and that courts "usually" dismiss a complaint for noncompliance. *Mach Mining*, 135 S. Ct. at 1651. That is, as *Zipes* holds, noncompliance is sometimes excusable. "Similarly," the Court continued, "an employee must obtain a right-to-sue letter" to sue—"and a court will *typically* insist on satisfaction of that condition." *Id.* (emphasis added). A *jurisdictional* requirement admits of no exceptions, typical or atypical. *Mach Mining*, in other words, aligns with the consistent approach of the lower courts: receipt of the right-to-sue letter is not jurisdictional.

The timeliness requirement and the right-to-sue-letter requirement are like the charge-filing requirement in every way that matters.[29] All relevant parts of the process, they "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (describing nonjurisdictional "claim-processing rules"). And, all situated outside of Title VII's "jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3)," *Arbaugh*, 546 U.S. at 515, they give no hint of "govern[ing] a court's adjudicatory authority[,]" *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (internal quotation marks and citation omitted). While filing deadlines are "quintessential claim-processing rules," *Henderson*, 562 U.S. at 435, no case suggests that filing deadlines are the only nonjurisdictional claim-

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[29] *Amicus* assumes for present purposes that the "timeliness requirement" and the "charge-filing requirement" are indeed independent, as Petitioner apparently believes, given that it is not asking this Court to overrule *Zipes*.

processing rules. There are many ways a requirement may "speak . . . to the rights or obligations of the parties" rather than to "the power of the court[.]" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (quoting *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)).

That is exactly what the charge-filing requirement does. No one doubts that it is required, or that it serves useful purposes. But a condition should not "be ranked as jurisdictional merely because it promotes important congressional objectives." *Reed Elsevier*, 559 U.S. at 169 n.9. It certainly should not be classified as such where text and context do not indicate Congress meant noncompliance to oust the courts of jurisdiction.

III. CONSIDERATIONS OF JUDICIAL EFFICIENCY AND FAIRNESS INDICATE THAT THE CHARGE-FILING REQUIREMENT IS NOT JURISDICTIONAL.

This Court has long recognized that careless application of the word "jurisdictional" has negative, structural consequences for fairness and efficiency. *See Henderson*, 562 U.S. at 435 ("Because the consequences that attach to the jurisdictional label may be so drastic, we have tried in recent cases to bring some discipline to the use of this term."). Many statutes impose prerequisites to filing on potential litigants, but "[a] statutory condition that requires a party to take some action before filing a lawsuit is not automatically 'a *jurisdictional* prerequisite to suit.'" *Reed Elsevier, Inc.*, 559 U.S. at 166 (quoting *Zipes*, 455 U.S. at 393).

Determining whether a requirement is jurisdictional requires looking not only at the language, structure, and context of the statute, but also at its purpose and the effect of a jurisdictional bar on fairness and judicial economy. *See, e.g.*, *Gonzalez*, 565 U.S. at 141–44 (finding that the "unfair prejudice" that would result from jurisdictional treatment of a provision counseled against holding it jurisdictional) (alteration omitted) (citation omitted); *Arbaugh*, 546 U.S. at 513–14 (resolving a Title VII jurisdictional question "mindful of the consequences" associated with "typing [it] a determinant of subject-matter jurisdiction"); *id.* at 515 (finding it the "sounder course" to "refrain from constricting" federal-question jurisdiction or "Title VII's jurisdictional provision" given "the unfair[ness] and waste of judicial resources" that a jurisdictional rule would cause (alteration in original) (internal quotation marks and citation omitted); *Zipes*, 455 U.S. at 398 (looking to the "remedial purpose of" Title VII in refusing to hold a rule jurisdictional). That is particularly true in the Title VII context, where this Court's interpretive "guiding principle" has been that "technical" readings are "'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.'" *Zipes*, 455 U.S. at 397 (quoting *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972)). This case presents a paradigmatic example of how considerations of fairness and judicial economy counsel against a jurisdictional bar.

First, as discussed in Part I.B, the elevated risk of traps for the unwary in this context counsel against interpreting the presuit filing requirement as jurisdictional.

Second, an unwarranted jurisdictional rule also undermines judicial efficiency and permits sandbagging. Characterizing any rule as jurisdictional inherently adds to the lower courts' burden by obligating them in every case to ensure the rule has been satisfied. *See Arbaugh*, 546 U.S. at 514. Beyond that intrinsic burden, this case exemplifies the further potential drain on judicial resources from a jurisdictional rule. Here, Petitioner was put on notice of Respondent's religious discrimination claim, at the latest, in January 2012. *See* J.A. 16, 22–24 (original complaint raising religious discrimination claim filed January 13, 2012). The parties exchanged pleadings, engaged in discovery, filed dispositive motions, and appealed the district court's resolution of those motions, all without Petitioner raising any question of the adequacy of the EEOC charge. *See id.* 7–15 (district court docket). Only after years of litigation did Petitioner challenge the adequacy of the EEOC charge, requesting that the district court summarily discard years of work. This is exactly the type of potentially "wasted" effort that this Court has warned should not be "lightly" mandated. *Gonzalez*, 565 U.S. at 141 (citation omitted).[30]

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[30] The operative complaint contains no state-law claims, but as this Court noted in *Arbaugh*, imposing a rule that would require the jurisdictional dismissal of a complaint's federal claims would also require dismissing the "complaint in its entirety," i.e., including any pendent state-law claims. 546 U.S. at 514. Characterizing a rule as requiring merely a nonjurisdictional dismissal means the court "retains discretion" to keep jurisdiction over pendent state-law claims. *Id.* That discretion may be significant where a court has already expended substantial energy on the state-law claim and there is no reason the state courts would be better suited to address it.

Judicial efficiency is also protected by removing incentives for judicial resources to be misused. We do not know why Respondent failed to raise this issue until years after it ought to have known of it. Whatever the cause in this case, typing this rule jurisdictional makes it more likely that defendants will fail to raise charge inadequacy until well into a case. It may encourage negligence on this front by reducing the cost of a defendant sleeping on its rights, and it may encourage a defendant—wisely or unwisely—to attempt strategically to "hold in reserve" an inadequacy.

In sum, this case involves a remedial statutory scheme protecting fundamental civil rights, often initiated by unschooled and pro se litigants. It would be anomalous to prevent courts from applying principles of equity to the charge-filing requirement. Congress did not intend to "disarm litigants" and "waste . . . adjudicatory resources," *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013), by conditioning federal jurisdiction on Title VII's charge-filing requirement.

CONCLUSION

Absent any indication that the charge-filing requirement has jurisdictional status and given Congress's clear intent that the private right of action remain robust, this Court should reaffirm its "guiding principle" for interpreting Title VII and affirm the court below.

Respectfully submitted,

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April 3, 2019

No. 18-525

In the Supreme Court of the United States

FORT BEND COUNTY, TEXAS,

Petitioner,

v.

LOIS M. DAVIS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES, AND NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are not-for-profit organizations whose mission is to advance the interests of state and local government officials and thereby ensure the smooth functioning of state and local government. *Amici* monitor and analyze legal developments that have a distinct impact on the business of state and local governments, and they take positions advocating for greater protection of government officials as they serve the public good.

The National Conference of State Legislatures ("NCSL") is a bipartisan organization that serves the legislators and staffs of the Nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies and regularly submits *amicus* briefs to this Court in cases, like this one, that raise issues of vital state concern.

The National Association of Counties ("NACo") is the only national organization that represents

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amici*, their members, and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Petitioner and Respondent have filed a blanket consent with this Court to the filing of all *amicus* briefs.

county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's 3,069 counties through advocacy, education, and research.

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The National Public Employer Labor Relations Association ("NPELRA") is a national organization for public sector labor relations and human resources professionals. NPELRA is a network of state and regional affiliations, with over 2,300 members, that represents agencies employing more than 4 million federal, state, and local government workers in a wide range of areas. NPELRA strives to provide its members with high quality, progressive labor relations advice that balances the needs of management and the public interest, to promote the interests of public sector management in the judicial and legislative areas, and to provide networking opportunities for members by establishing state and regional organizations throughout the country.

The International Public Management Association for Human Resources ("IPMA-HR") represents human resource professionals and human resource departments at the federal, state, and local levels of government. IPMA-HR was founded in 1906 and currently has over 8,000 members. IPMA-HR promotes public-sector human resource management excellence through research, publications, professional development and conferences, certification, assessment, and advocacy.

The National School Boards Association ("NSBA"), through its state associations of school boards, represents the Nation's 90,000 school board members, who, in turn, govern approximately 13,800 local school districts serving more than 50 million public school students. NSBA's mission is to

promote equity and excellence in public education through school board leadership.

This case directly impacts the interests of *amici* and their members. If the Fifth Circuit's decision is affirmed, courts would be allowed to exercise jurisdiction over unexhausted claims. The resulting costs, efficiency losses, and abrogation of sovereign immunity would impose a heavy burden on state and local governments.

Amici have a strong interest in ensuring the financial viability of state and local governments so they can provide the critical services to the public they were created to deliver. Moreover, sovereign immunity is designed to protect governments from such burdens, and *amici* have a strong interest in ensuring any abrogation of that immunity is narrowly construed. The Fifth Circuit's decision imperils those interests, and it should be reversed.

SUMMARY OF ARGUMENT

The undersigned *amici* urge this Court to reverse the decision below. The Court should hold that Title VII's exhaustion requirement is jurisdictional so that employees are required to proceed through the EEOC's informal phases of investigation and conciliation. This procedure promotes judicial efficiency and resolution of disputes inexpensively and outside of court.

Requiring employees to exhaust their administrative remedies is not burdensome. All but three of the States have entered into work-sharing agreements with the EEOC, eliminating duplication by providing that only one agency processes a complaint. That one agency investigates, mediates, conciliates, and issues a determination on the employee's federal and state law claims. Moreover, the majority of state agencies have procedures that mirror the investigatory and conciliatory process of the EEOC. In most states, complainants need only file a complaint and request a notice of right to sue in order to exhaust their administrative remedies. The agencies work in concert so that complaints under state and federal law move through the pipeline in lockstep. Once those administrative remedies are exhausted, plaintiffs can file one civil action that encompasses both federal and state claims.

If this Court holds that Title VII's administrative exhaustion requirement is not jurisdictional, it would eliminate some meaningful settlement opportunities. The agency's screening function, particularly in the conciliation and mediation phases of the administrative process, helps prevent cases from proceeding to court—cases that could have been resolved at the agency level. Indeed, a significant percentage of employment discrimination disputes are resolved during that process.

Moreover, a holding by this Court that Title VII's administrative exhaustion requirement is a mere claims-processing rule would impose signifi-

cant costs on state and local governments. Title VII claims that proceed to the courthouse constitute a substantial drain on state and local government treasuries, based as they are on factual issues surrounding whether intentional discrimination occurred. State and local governments, with their limited budgets and the critical nature of the services they must provide to the public, are poorly positioned to contend with such suits and thus are subjected to immense pressure to settle even nonmeritorious cases.

Moreover, if the Court holds that Title VII's administrative exhaustion requirement is a mere claims-processing rule, it would constitute a further abrogation of the States' sovereign immunity. As Justice Kennedy wrote in *Alden v. Maine*, 527 U.S. 706 (1999), "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . ." *Id.* at 713. As Title VII itself constitutes an abrogation of State sovereign immunity, this further abrogration should be narrowly construed if it is entertained at all.

Congress enacted the 1972 Amendments to Title VII under an exception to the doctrine of sovereign immunity—Section 5 of the Fourteenth Amendment. Congress took such action based on serious, documented instances of intentional discrimination by state governments, backed up by empirical evidence contained in committee reports. By holding that Title VII's administrative exhaus-

tion requirement is not jurisdictional, this Court would further abrogate the States' sovereign immunity—without Congress's involvement, without careful review of studies and committee reports, and without bicameralism and presentment. This further abrogation should not occur at all, but if it ever does, it should be due to an action by Congress, not the Court.

Based on these concerns regarding efficiency, cost, and sovereign immunity, as well as those voiced by Petitioner, *amici* urge this Court to reverse the decision below and hold that Title VII's administrative exhaustion requirement is jurisdictional.

ARGUMENT

I. This Court Should Hold that Title VII's Exhaustion Requirement Is Jurisdictional Because the Administrative Process Is Not Burdensome and Provides Opportunities for Inexpensive Dispute Resolution.

Congress carefully crafted the statutory scheme in Title VII of the Civil Rights Act of 1964,[2] which

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[2] Title VII provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of

created the Equal Employment Opportunity Commission ("EEOC"). Recognizing that employment disputes are plentiful, Congress imbued the EEOC with the authority to enforce the statute by investigating complaints of discrimination, allowing the employer and employee to see if the claim had merit or some accommodation could be reached during a 180-day cooling-off period. Congress intended by the statute's very terms that issues be resolved through what is an effective pre-suit mediation effort. As Petitioner argues, this Court should support the intent of Congress. *See* Pet. Br. 4, 27-28, 29 (arguing that proponents of the 1972 Amendments to Title VII "expected that litigation would be 'the exception and not the rule,' with 'the vast majority' of cases resolved outside of court.") (citing 118 CONG. REC. 7168 (1972) (Conf. Rep.)).

A majority of states followed suit and enacted anti-discrimination statutes mirroring Title VII's statutory scheme. Most of those statutes, like Title VII, require employees to exhaust their administrative remedies by first filing complaints or charges of discrimination with an administrative agency before commencing a civil action.

As noted, the purpose of Title VII's exhaustion requirement is "to give the administrative agency the opportunity to investigate, mediate, and take

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such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a).

remedial action." *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 384 (2d Cir. 2015); *see also* 42 U.S.C. § 2000e-5(b) (if "reasonable cause" exists to believe the charge is true, the EEOC must attempt to "eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."). If those efforts fail, the EEOC may either bring suit in federal court or notify the employee so that he or she may file an employment discrimination suit within 90 days of the notification. *See* 42 U.S.C. § 2000e-5(f)(1). In the event the employer is a "government, governmental agency, or political subdivision . . . the [EEOC] shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court." *Id.*

Some states have authorized an agency to grant relief for prohibited employment discrimination. *See id.* § 2000e-5(c). Employees who choose to file with a state agency shall also file a "charge" with the EEOC within 300 days of the alleged unlawful employment practice, or within 30 days after receiving notice that the analogous state agency has terminated proceedings, whichever is earlier. *See id.* § 2000e-5(e)(1).

A. The Exhaustion Scheme Is Not Burdensome.

The requirement that employees exhaust their administrative remedies is not burdensome. Indeed,

it promotes judicial efficiency. Requiring exhaustion in every case allows the investigative phase of the administrative process to bring to light facts that surface meritless claims. The agency's conciliation process may also bring about efficient and inexpensive resolution. *See* 42 U.S.C. § 2000e-5(b).

This efficiency is aided, in part, by the work-sharing agreements between the EEOC and forty-seven state agencies.[3] The only states without such work-sharing agreements are Alabama, Mississippi, and Arkansas.[4] These work-share agreements promote efficiency by having one agency process and investigate a complaint.

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[3] *See* https://www.eeoc.gov/field/atlanta/fepa.cfm; https://www.eeoc.gov/field/birmingham/fepa.cfm; https://www.eeoc.gov/field/charlotte/fepa.cfm; https://www.eeoc.gov/field/chicago/fepa.cfm; https://www.eeoc.gov/field/dallas/fepa.cfm; https://www.eeoc.gov/field/indianapolis/fepa.cfm; https://www.eeoc.gov/field/losangeles/fepa.cfm; https://www.eeoc.gov/field/memphis/fepa.cfm; https://www.eeoc.gov/field/miami/fepa.cfm; https://www.eeoc.gov/field/newyork/fepa.cfm; https://www.eeoc.gov/field/philadelphia/fepa.cfm; https://www.eeoc.gov/field/phoenix/fepa.cfm; https://www.eeoc.gov/field/sanfrancisco/fepa.cfm; https://www.eeoc.gov/field/stlouis/fepa.cfm.

[4] *See* https://www.eeoc.gov/field/littlerock/fepa.cfm (no local agencies in Arkansas or Mississippi); https://www.eeoc.gov/field/birmingham/fepa.cfm (showing only Florida, which falls under the jurisdiction of the Birmingham office).

Specifically, employees that file a complaint with the EEOC can also choose to file a complaint with the associated state agency and vice versa. One agency will then mediate, conciliate, investigate, and issue a determination on all the claims under both federal and state law. This process allows the claims of discrimination under state and federal law to proceed on one track rather than in separate, duplicative claims. The EEOC and those agencies with which it has entered into work-share agreements now operate in a carefully balanced, symbiotic relationship. If this Court held that the Title VII administrative exhaustion requirement was not jurisdictional, this balance would suffer severe disruption.

1. Exhaustion of Administrative Remedies with the EEOC Is Straightforward.

Title VII provides that any aggrieved person can file a written charge, under oath or affirmation, with the EEOC. 42 U.S.C. § 2000e-(5)(b). As noted, an aggrieved person must file a charge within 300 days if there is a state or local agency that prohibits discrimination. *Id.* § 2000e-(5)(e)(1). If there is no such state or local agency, an aggrieved person must file within 180 days of the alleged discriminatory act. *Id.*

The process for filing a charge is simple and straightforward. Aggrieved employees can file a charge on-line or in person.

https://tinyurl.com/y6aehlq3. The EEOC's public portal allows an employee to submit an inquiry, schedule an appointment, and file a charge. *Id.* When the employee submits an inquiry through the public portal, the on-line assessment asks him or her to check off boxes regarding the type of employer (i.e., private, governmental, union, etc.), the date of the alleged discriminatory conduct, the state, the employee's protected classification, and the number of employees. https://tinyurl.com/y67dvffa. The aggrieved employee will then schedule an interview with the EEOC's intake unit. At the interview, an EEOC staff member asks the employee questions and prepares a charge for the employee's signature. Once the form is complete, the employee signs the charge, which will be filed. https://www.eeoc.gov/employees/howtofile.cfm.

If the employee prefers, he or she can meet with the EEOC in person by scheduling an appointment on-line or going to the EEOC's office closest to him or her for a walk-in appointment. *Id.* The EEOC staff member prepares the charge based on the information provided by the employee. The employee reviews the form and signs it on-line by logging into his or her account. *Id.*

Although the EEOC will not take a charge over the telephone, it will accept calls to discuss the employee's situation, determine if the situation is covered by the relevant laws, and explain how to file a charge. *Id.*

Once the charge is filed, the EEOC will serve the charge on the Respondent and conduct an investigation. *Id.* § 2000e-(5)(b). This investigation will result in a determination that (1) there is no reasonable cause to determine that discrimination occurred and issuance of a Notice of Right to Sue; or (2) there is reasonable cause to suspect discrimination. *Id.* §§ 2000e-(5)(b), 2000e-5(f). If the EEOC issues the latter determination, it invites the parties to conciliation. *Id.* § 2000e-5(b).

If conciliation efforts fail, the EEOC can either file a civil action in federal court or issue the complainant a Notice of Right to Sue. *Id.* § 2000e-(5)(f)(1). With respect to the first option, if a case is meritorious, the EEOC has a right of first refusal to bring litigation. *Id.* Such EEOC-filed suits are often more streamlined and efficient than those filed by private parties. If the respondent is a government, a government agency, or a political subdivision, the case is referred to the Attorney General to file suit. *Id.*

A Complainant has 90 days from the issuance of the Notice of Right to Sue to file suit. *Id.* He or she can request a Notice of Right to Sue, as a matter of right, if the request is made 180 days after filing and the EEOC has not completed its investigation of the charge. 29 C.F.R. § 1601.28(a)(1). However, a Complainant may request a Notice of Right to Sue before the expiration of 180 days, and the EEOC will issue the Notice if it determines that it will be unable to complete its investigation within six

months of filing. 42 U.S.C. § 2000e-(5)(f)(1); 29 C.F.R. § 1601.28(a)(2).

2. Most States Have Administrative Exhaustion Procedures that Mirror the EEOC's Procedures.

The majority of state agency procedures mirror the EEOC's investigatory and exhaustion process. *See, e.g.*, ARIZ. REV. STAT. ANN. § 41-1481(D); CAL. GOV'T. CODE § 12965; COLO. REV. STAT. § 24-34-306(14); CONN. GEN. STAT. § 46a-101; DEL. CODE ANN. tit. 19, § 712(B); FL. STAT. §§ 760.11(4), 760.11(8); HAW. REV. STAT. §§ 368-(11), 368-(12); IDAHO CODE. ANN. § 67-5908(2); 775 ILL. COMP. STAT. §§ 5/7A-102(C)(4), 5/7A-102(C-1); IND. CODE § 22-9-8-3; IOWA CODE § 216.16; KAN. STAT. ANN. § 44-1005(i); ME. REV. STAT. 5 § 4612(6); MD. CODE. ANN. STATE GOV'T § 20-1013(a); MASS. GEN. LAWS ch. 151B § 9; MO. REV. STAT. § 213.111; MONT. CODE ANN. § 49-2-512; NEV. REV. STAT. § 613.420; N.H. REV. STAT. ANN. § 354-A:21-a; N.M. CODE R. § 9-1-1.8(I); OKLA. STAT. tit. 25, § 21-1350(B); 43 PA. CONST. STAT. § 962(c)(1); R.I. GEN. LAWS ANN. § 28-5-24.1; S.C. CODE ANN. § 1-13-90(d)(6)-(8); S.D. CODIFIED LAWS § 20-13-35.1; TEXAS LAB. CODE § 21.252-54; W. VA. CODE § 5-11-13(b).

Due to this mirroring of the EEOC's procedures in the majority of states, not to mention the fact that 47 out of 50 states are parties to work-share agreements with the EEOC, aggrieved individuals need only file a complaint and request a notice of right to

sue to exhaust their administrative remedies. These requirements are not remotely burdensome.

3. A Minority of States Enacted Statutes that Do Not Require Employees To Exhaust State Administrative Remedies.

A minority of states do not require employees to exhaust administrative remedies prior to commencing a civil action because no such requirements appear in the relevant state statute. For example, Alaska does not require individuals aggrieved under its non-discrimination statute to first file suit with the Alaska State Commission on Human Rights. *See* ALASKA STAT. § 18.80.145. Other such states are Kentucky, Louisiana, Michigan, Minnesota, Nebraska, New Jersey, New York, North Dakota, Ohio, Oregon, Tennessee, Vermont, Virginia, and Washington. *See* KY. REV. STAT. ANN § 344, *et seq.*;[5] LA. REV. STAT. ANN. § 23.303; MICH. COMP. LAWS § 37.2803; MINN. STAT. § 363A.28; NEB. REV. STAT. § 20-148; N.J. STAT. ANN. § 10:5-13; N.Y. EXEC. LAW § 297(9); N.D. CENT. CODE § 14-02.4-19; OHIO REV. CODE ANN. § 4112.99; OR. ADMIN R. 839-003-0020(2)(a); TENN. CODE ANN. § 4-21-401(d)(5); VT.

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[5] Kentucky's statute does not require employees to exhaust their administrative remedies. Instead, an employee can elect to file an administrative complaint or immediately file a civil action for their state law claims. *See Owen v. Univ. of Ky.*, 486 S.W.3d 266, 269 (Ky. 2016).

STAT. ANN. tit. 21, § 5-495(b); VA. CODE ANN. § 2.2-3903(c); WASH. REV. CODE § 49.60.020.

A smaller number of states do not have administrative exhaustion requirements at the state level because they do not permit private suits. Employees aggrieved under Title VII in jurisdictions with no state or local agency and no relevant state statute must follow the EEOC's administrative requirements. These states include Alabama[6] and Mississippi.[7] In Georgia, the Georgia Fair Employment Practices Act of 1978, GA. CODE ANN. § 45-19-20, *et seq.*, provides protections only to public employees. *See id.* § 45-19-21. However, it does not permit private suits, so those employees may not bring a claim directly to state court. Public employees may only *appeal* the final determination of the administrative agency to Georgia's state courts or request a Notice of Right to Sue from the EEOC and bring a civil action on their federal claims. *Id.* § 45-19-39.

Four states have state agencies that investigate and enforce but do not permit private suits. The North Carolina Human Relations Commission

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[6] *See* Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L. L. REV. 1, 48 (2015) (noting that Alabama has no statewide law forbidding discrimination in employment or public accommodations).

[7] *Id.* at n.149. Without a state agency, it makes sense that these are two of the three states without work-share agreements. *See supra* p. 10.

in the Civil Rights Division of the Office of Administrative Hearings is authorized to receive and investigate complaints of discrimination filed with the EEOC, but does not enforce North Carolina's Equal Employment Practices Act. N.C. GEN STAT. ANN. § 143-422.1-3. The same is true for Utah's Anti-discrimination and Labor Division. *See* UTAH CODE ANN. § 34A-5-107(15)-(16). Wisconsin and Wyoming both have state agencies—the Wisconsin Equal Rights Division and the Wyoming Department of Employment, Labor Standards Division—that investigate and enforce the state statutes, but those statutes do not permit private suits. WIS. STAT. § 111.02, *et seq.*;[8] WYO. STAT. ANN. § 27-9-106.

Finally, although Arkansas has a state statute that permits private suits, it has no administrative agency to investigate and enforce such complaints.[9] Therefore, employees aggrieved under its statute may file their state claim directly in state court within one year of the alleged discriminatory act or within ninety days of receiving a Right to Sue Notice from the EEOC, whichever is later. ARK. CODE ANN. § 16-123-107(c).

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[8] *See also Bachand v. Connecticut Gen. Life Ins. Co.*, 305 N.W.2d 149, 152 (Wis. Ct. App. 1981).

[9] Arkansas is the third state without a work-share agreement, again, because it has no administrative agency. *See supra* p. 10.

In sum, neither the EEOC nor the state procedures are onerous. The presence of work-share agreements with the EEOC in 47 of the 50 states and the fact that most state procedures mirror the EEOC's procedures make the process straightforward for plaintiffs.

B. Allowing Courts To Exercise Jurisdiction Over Unexhausted Claims Would Eliminate Meaningful Opportunities To Settle the Case in Conciliation Proceedings.

Most agencies, including the EEOC, have a screening function, due to the conciliation and mediation phases of the administrative process, which resolve a significant percentage of employment discrimination claims. Absent the jurisdictional requirement to exhaust administrative remedies, those opportunities would be lost every time a plaintiff proceeds directly to federal court.[10]

For example, in 2017:

- The Connecticut Commission on Human Rights and Opportunities received 1,963 complaints of employment discrimination and 2,376 complaints generally. That same year,

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[10] This is especially true for pro se litigants who often rely on agency investigators and mediators for assistance in settlement negotiations.

1,050 complaints were withdrawn after the parties reached settlement, and only 540 requested a release of jurisdiction so as to file a civil action. https://www.ct.gov/chro/lib/chro/CHRO_Case_Processing_Report_FY_2016-17.pdf at 1-2.

- The California Department of Fair Employment and Housing (DFEH) received a total of 24,779 complaints, of which 12,872 were employment complaints filed along with a request for an immediate Right-to-Sue letter, and 6,160 complaints were filed as the result of an intake interview conducted by a DFEH investigator. Of those 6,160 complaints, 4,346 were employment complaints. DFEH facilitated resolution in 888 cases. https://tinyurl.com/yxh6rcv4 at 8-9.

- The Illinois Department of Human Rights received a total of 3,201 new complaints; 2,748 of those were for employment discrimination. In that same year, the Department settled 809 complaints. https://tinyurl.com/yag3t9l9 at 15-16.

- The Massachusetts Commission Against Discrimination administratively closed 1,561 cases. Of those 1,561 cases only 319 were removed to Court; 774 were settled or conciliated, and the remaining were administratively dismissed. https://www.mass.gov/

files/documents/2018/06/20/2017%20Annual%20Report%20FINAL%2006-12-2018.pdf at 17.

- The Texas Workforce Commission received 11,056 employment discrimination complaints. Of those complaints, 1,687 were settled or withdrawn with benefits or conciliated. https://twc.texas.gov/files/news/2017-twc-annual-report-twc.pdf at 38 (Tables 2-3).

These numbers reflect the fact that exhausting administrative remedies results in a significant number of settled or closed claims. The EEOC and state equivalents provide an important function by weeding out those cases that do not require judicial intervention or oversight. Allowing courts to exercise jurisdiction over unexhausted claims serves no one. Reversal of the decision below is warranted.

C. Holding that Title VII's Administrative Exhaustion Requirement is a Mere Claims-Processing Rule as Opposed to a Jurisdictional Prerequisite to Suit Will Impose Burdensome Costs on State and Local Governments.

This Court should hold that Title VII's administrative exhaustion requirement is a jurisdictional prerequisite to suit. Otherwise, allowing plaintiffs to proceed directly to federal court without exhausting their administrative remedies would impose sig-

nificant costs on Title VII defendants, including state and local governments. *Cf. Williams v. Pa. Human Rels. Comm'n*, 870 F.3d 294, 299 (3d Cir. 2017) (warning against "thwart[ing] Congress's carefully crafted administrative scheme by throwing open a back door to the federal courthouse when the front door is purposefully fortified.").

Title VII claims are a significant drain on state and local government resources. Such claims are notorious for engendering dueling versions of events and "the elusive factual question of intentional discrimination," *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 n.8 (1981), and the expense can be crippling. *See, e.g., Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 447 (2003) (describing the expense as "potentially crushing") (quoting *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999) (Posner, J.)). The factual inquiry into whether the employer intentionally discriminated against the employee is "both sensitive and difficult" and usually cannot be answered by direct evidence, making Title VII cases more expensive than most. *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

Costly litigation is particularly hard on state and local governments, which must provide critical public services on a very limited budget. Every dollar spent on Title VII litigation is money taken away from the provision of public services. Litigation costs lead many governments to settle employment discrimination lawsuits once they are in court—even

those that are completely meritless. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 617 (2001) (Scalia, J., concurring) (noting that defendants sometimes "'abandon[]the fray' because the cost of litigation—either financial or in terms of public relations—would be too great"), *superseded on other grounds by* 5 U.S.C. § 552(a)(4)(E).

Administrative exhaustion provides the parties with an opportunity to proceed through conciliation and inexpensively settle the case. Moreover, the intended policy of allowing the employer and employee to hear each other and accommodate each other's issues would be thwarted if the employee failed to bring a grievance to the employer's attention during the conciliation process but then was allowed to sue on that grievance. If an employee can bring suit on any issue, whether raised or not with the EEOC, the courts will be faced with suits based on later-contrived claims when conciliation fails. Allowing courts to exercise jurisdiction over unexhausted claims does not serve the best interests of either party.

II. This Court Should Hold that Title VII's Exhaustion Requirement Is Jurisdictional To Prevent an Unwarranted Abrogation of Sovereign Immunity.

Principles of federalism should inform the Court's analysis as it determines whether Title VII's administrative exhaustion requirement is a jurisdictional prerequisite to suit. "[I]t was the insight of

the Framers that freedom was enhanced by the creation of two governments, not one." *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J. and O'Connor, J., concurring). Holding that the exhaustion requirement was merely a claims-processing rule would constitute an abrogation of the States' sovereign immunity, impinging on federalism interests. Sovereign immunity was designed to protect state governments from the burdens of expensive lawsuits such as Title VII actions. This Court should narrowly construe any such abrogation.

A. The Eleventh Amendment and State Sovereign Immunity

The Eleventh Amendment embodies the premise of sovereign immunity, described as "foundational" to our government, which provides that "States, as sovereigns, are immune from suits for damages, save as they elect to waive that defense." *Coleman v. Court of Appeals*, 566 U.S. 30, 35 (2012) (citing *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72-73 (2000); *Alden v. Maine*, 527 U.S. 706 (1999)). It provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

While originating in the English common law theory that "the King can do no wrong," the modern view of sovereign immunity "now rests on policy

considerations including separation of powers, the protection of public funds, and the efficient and uninterrupted administration of government functions." Amanda Coffey, *Local Government Sovereign Immunity 201: Florida*, https://www.americanbar.org/content/dam/aba/administrative/state_local_government/SovImm201.authcheckdam.pdf at 1.

This Court has viewed the Eleventh Amendment as a "specific constitutional bar against hearing even federal claims that otherwise would be within the jurisdiction of the federal courts." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 120 (1984). A state government agency is part of the state for purposes of the Eleventh Amendment. *See Florida Dep't of Health & Rehab. Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981).

B. Holding that Title VII's Administrative Exhaustion Requirement Is Not Jurisdictional Would Constitute a Further Abrogation of the States' Sovereign Immunity.

State sovereign immunity is not absolute; exceptions exist. One of those exceptions is Congressional abrogation.[11]

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[11] Other exceptions include the *Ex Parte Young* doctrine, *Ex parte Young*, 209 U.S. 123 (1908); the "arm of the state" doc-

Congress can abrogate State sovereign immunity by enacting a federal law pursuant to Section 5 of the Fourteenth Amendment that is intended to impose liability on State governments. *See Coleman v. Court of Appeals*, 566 U.S. 30, 35 (2012). In recent years, the Court has held that laws passed pursuant to Section 5 are valid only if there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), *superseded on other grounds by* 42 U.S.C. § 2000cc-1(b). Specifically, Congress may abrogate State sovereign immunity under Section 5 only when the statutory provision specifically remedies "conduct transgressing the Fourteenth Amendment's substantive provisions." *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639 (1999).

Congress's enactment of the Equal Employment Opportunity Act of 1972, amending Title VII ("1972 Amendments"), was just such an abrogation. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 & n.9 (1976) ("There is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment.") (citing H.R. REP. NO. 92-238, at 19 (1971); S. REP. NO. 92-

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trine, *Alden v. Maine*, 527 U.S. 706, 756 (1999); and voluntary waiver, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 235, 238 (1986); *see also Edelman v. Jordan*, 415 U.S. 651, 673 (1974).

415, at 10-11 (1971)). The 1972 Amendments authorized federal courts to award money damages in favor of a private individual against a state government that subjected that individual to employment discrimination on the basis of race, color, religion, sex, or national origin. *Fitzpatrick*, 427 U.S. at 447-48. These amendments "retained the right of an individual aggrieved by an employer's unlawful employment practice to sue on his or her own behalf, upon satisfaction of the statutory procedural prerequisites, and made clear that the right was being extended to persons aggrieved by *public* employers." *Id.* at 449 n.2 (emphasis added) (citing, *inter alia*, 1972 Amendments, Pub. L. No. 92-261, § 4(a), 86 Stat. 104, 42 U.S.C. §§ 2000e-5(a)-(g)).

This was not done lightly. Congress extended Title VII to the States by "inferr[ing] a broad pattern of discrimination[,] combining documented instances of intentional discrimination by state governments with extensive numerical evidence of race- and gender-based disparities in pay and promotions." Claude Platton, *Title VII Disparate Impact Suits Against State Governments after Hibbs and Lane*, 55 DUKE L.J. 641, 661 (2005). Congress relied "in large part" on a 1969 report by the United States Commission on Civil Rights regarding racial and national-origin discrimination in state and local government employment. *Id.* at 657 & n.11 (citing U.S. COMM'N ON CIVIL RIGHTS, FOR ALL THE PEOPLE . . . BY ALL THE PEOPLE: A REPORT ON EQUAL OPPORTUNITY IN STATE AND LOCAL GOVERNMENT EMPLOYMENT (1969)).

The House Committee on Education and Labor stated that the Commission's 1969 report "documented that 'widespread discrimination against minorities exists in State and local government employment, and that the existence of this discrimination is perpetuated by the presence of both institutional and overt discriminatory practices.'" *Id.* at 657 & n.113 (quoting H.R. REP. NO. 92-238, at 17-18 (1971), *reprinted in* SUBCOMM. ON LABOR, S. COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 77-78 (1982)). The House Committee stated that "[t]he report cites widespread perpetuation of past discriminatory practices through *de facto* segregated job ladders, invalid selection techniques, and stereotyped misconceptions by supervisors regarding minority group capabilities." H.R. REP. NO. 92-238, at 17. Further, the Committee stated that, according to the report, "employment discrimination in State and local governments is more pervasive than in the private sector." *Id.*; *see also* Platton, *supra* p. 26, at 657-59 (discussing reports). As this Court stated in *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003), "Congress responded to this history of discrimination by abrogating States' sovereign immunity in Title VII of the Civil Rights Act of 1964 . . . ." *Id.* at 729.

Holding that Title VII's administrative exhaustion requirement is not jurisdictional is a *further* abrogation of the States' sovereign immunity. But the distinguishing factors between Respondent's ef-

forts here and Congress's enactment of the 1972 Amendments to Title VII are legion.

Put simply, the Court is not Congress. Congress intended Title VII's exhaustion requirement to be jurisdictional, and if that is to change, it is Congress rather than the Court that should take action. This Court has held that the legislative process is the proper way to protect State sovereign interests. *See, e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 551-52, 556 (1985) ("State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations . . . . The political process ensures that laws that unduly burden the States will not be promulgated."), *superseded on other grounds by* the Fair Labor Standards Act of 1985, Pub. L. 99-150, 99th Cong., 1st Sess. 10, 99 Stat. 787 (codified as amended in 29 U.S.C. § 207(o)(1)) (quoting THE FEDERALIST NO. 62, at 408 (James Madison) (B. Wright ed. 1961) (describing the States' equal representation in the Senate as "at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty."); THE FEDERALIST NO. 43, at 315 (James Madison) (B. Wright ed. 1961) ("the residuary sovereignty of the States [is] implied *and secured* by that principle of representation in one branch of the [federal] legislature." (emphasis added); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 435 (1819)).

This further abrogation urged by Respondents has not been entrusted to voted-in representatives enacting legislation after careful review and consideration in standing committees, and in accordance with the trusted procedures of bicameralism and presentment. No extensive studies have been conducted; there have been no findings on discrimination, no statistical support, nothing justifying this infringement of the States' sovereign right not to be haled into court without the benefits of the administrative process designed and enacted by Congress.

Sovereign immunity is a doctrine designed to protect state governments from just such burdens. As one scholar has written, sovereign immunity is "one of the Constitution's (implicit) austerity measures, allowing governments to balance the public interest against their contractual obligations and liabilities to individuals." Ernest A. Young, *Law in an Age of Austerity: Its Hour Come Round at Last?*, 35 HARV. J.L. & PUB. POL'Y 593, 621 (2012). And it is there that *amici*'s arguments in support of Petitioner coalesce, grounded in concerns regarding efficiency, cost, and sovereign immunity—the doctrine that strikes that balance. All of these interests support *amici*'s request that this Court hold Title VII's administrative exhaustion requirement is a jurisdictional prerequisite to suit. This Court should reverse the decision below.

CONCLUSION

For the foregoing reasons and those stated by Petitioner, the decision of the court below should be reversed.

Respectfully submitted,

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March 4, 2019

No. 18-525

In The
Supreme Court of the United States

FORT BEND COUNTY,

Petitioner,

v.

LOIS M. DAVIS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the Country, comprised of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its sixty-nine circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those treated illegally in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The Employee Rights Advocacy Institute for Law & Policy ("The NELA Institute") advances workers' rights through research and advocacy to achieve equality and justice in the American workplace. Founded in 2008, The NELA Institute is NELA's related charitable public interest organization that

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[1] Pursuant to Sup. Ct. R. 37.6, Amici submits that no counsel for any party participated in the authoring of this document, in whole or in part. In addition, no other person or entity, other than Amici, has made any monetary contribution to the preparation and submission of this document. Pursuant to Sup. Ct. R. 37.2, letters consenting to the filing of this Brief have been filed with the Clerk of the Court.

works hand in hand with NELA to create diverse, equitable, and inclusive workplaces in which there is mutual respect between employers and employees. The NELA Institute also seeks a wage for workers that provides at least a healthy standard of living in an environment free of discrimination, harassment, retaliation, and capricious employment decisions.

NELA and The NELA Institute have an interest in this case because the question presented to the Court is whether Title VII's administrative exhaustion process is a jurisdictional prerequisite to suit, creating unnecessary obstacles for victims of discrimination seeking relief, or a processing rule appropriately allowing unsophisticated victims of discrimination to navigate the EEOC's administrative process without having their claims dismissed if they don't perfectly fill out the forms used to process their claims. The Court's decision will impact not only NELA's members and their clients who are victims of discrimination, but also our country's commitment to the elimination of workplace discrimination through Title VII of the Civil Rights Act of 1964.

SUMMARY OF ARGUMENT

Interpreting Title VII's administrative investigative process as a jurisdictional requirement would unjustly limit the available paths to remedy employment discrimination. Because Title VII's procedures are intricate and initiated by laypersons, the accompanying

Title VII administrative process initiating those procedures should continue to be flexible and one that can be navigated by workers unsophisticated in legal technicalities. There is no reason to believe, and neither Fort Bend County nor its amici curiae have provided any evidence to substantiate, that a non-jurisdictional administrative exhaustion process would encourage an influx of lawsuits. Employees who believe they are victims of employment discrimination have no incentive to file meritless lawsuits or otherwise bypass the EEOC process in favor of costly litigation in federal court.

In contrast, under Fort Bend County's interpretation, employers would have an incentive to delay raising hyper-technical procedural issues until after litigation. This case illustrates that point. Here, the employer failed to play its "trump card" for five years, unnecessarily increasing the time spent in litigation. Pet'r's App. 14a. This delay has wasted the resources of the EEOC, the courts, and Ms. Lois Davis. Congress intended Title VII to provide remedies for victims of prohibited discrimination in the workplace and to eliminate further employment discrimination. An informal administrative exhaustion process, rather than a strict administrative pleading requirement, best furthers this purpose.

ARGUMENT

Title VII of the Civil Rights Act of 1964 was enacted by Congress with a goal of eradicating discrimination within the workplace. Initiating the EEOC's investigative process is simply part of a preliminary procedure for resolving the employee's claims, and not a jurisdictional predicate to suit. The heart of Fort Bend County's argument is that an employee's right to have their employment discrimination claim heard in court should be foreclosed because they failed to check a box on a federally developed charge form designed to expedite the clarification and investigation of charges. Here, Ms. Davis filed a timely charge of discrimination, indicating "religion" was part of her charge when she wrote "religion" on her EEOC questionnaire. J.A. 70-71, 90. Yet, because she failed to check the box saying "religion," Fort Bend County argues that her right to pursue this claim is foreclosed. In Fort Bend County's view, checking this box is a jurisdictional requirement which strictly narrows the scope of any subsequent litigation, regardless of later identified evidence. Pet'r's Br. 54. Under Title VII, the Court has never limited the scope of an employee's claim on such a technical, non-substantive ground, and the Court should not start now.

I. THIS COURT HAS CONSISTENTLY REJECTED A STRINGENT APPLICATION OF TITLE VII'S PROCEDURAL PROCESSING RULES.

Filing a charge with the EEOC is a condition precedent to bringing a Title VII claim in federal district court. This Court has previously reviewed Title VII's technical prerequisites and has yet to find any of them, such as employee-numerosity or timeliness, to be jurisdictional. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006) (employee-numerosity prerequisite); *see also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (timeliness of charge). This Court has also held that an intake questionnaire may, on its own, be enough to constitute a charge, thus empowering the EEOC to investigate. *See Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 402 (2008) ("[I]f a filing is to be deemed a charge it must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee."). Finally, the Court has recognized that filing a timely charge of discrimination "is subject to waiver, estoppel, and equitable tolling." *Zipes*, 455 U.S. at 393; *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 103 (2002).

In *Arbaugh*, this Court held that Title VII's employee-numerosity prerequisite was not jurisdictional. *Arbaugh*, 546 U.S. at 516. This Court explained that Congress had the power to make the prerequisite technically jurisdictional and intentionally did not do so. *Id.* at 514-15. Specifically, this Court stated that "[i]f

the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Id.* at 515-16 (emphasis added). It was further emphasized that rendering the employee-numerosity prerequisite jurisdictional would be "unfair[] and [a] waste of judicial resources." *Id.* at 515 (internal quotations omitted). Similarly, in *Zipes*, this Court held that a timely filing with the EEOC is not jurisdictional. *Zipes*, 455 U.S. at 393. The Court explained that the section discussing jurisdiction did not limit the district court's jurisdiction to cases with a timely EEOC filing. *Id.*

Here, Ms. Davis filed a timely charge with the appropriate state agency by filling out the agency's forms and indicating both her sex and religion as reasons for her termination. J.A. 70, 99-101. Similar to the analysis in *Arbaugh*, the legislature here has never "clearly stated" that checking all the right boxes on EEOC's intake form is a jurisdictional matter. Congress knows how to create a jurisdictional bar and did not do so here. Also similar to *Arbaugh*, it would be both unfair and a waste of judicial resources to dismiss a case because a layperson plaintiff failed to check a box when submitting an EEOC charge. Fort Bend County raised its jurisdictional objection for the first time after the Fifth Circuit Court of Appeals remanded the case, Pet'r's App. 21a-22a, and only after having vigorously contended that its actions did not constitute religious discrimination. Fort Bend County argues the case should be dismissed on jurisdictional grounds because

Ms. Davis failed to check the right box on the right form. Treating administrative exhaustion as jurisdictional gives defendants, and Fort Bend County here, an unfair advantage. Allowing defendants to raise the question of administrative exhaustion at any time strips a court's power to hear employment discrimination claims and incentivizes defendants to postpone raising the issue as a last resort. Under Petitioner's position, employers can file a motion to dismiss, a motion for summary judgement, and go to trial without ever raising an administrative exhaustion defense. There is no justification for allowing an employer to save the administrative exhaustion argument as a back-up plan if they receive an unfavorable verdict.

Finally, as discussed in detail in Resp't's Br. 5-7; J.A. 70, 99-101, Ms. Davis asserted both sex and religion as reasons she believed[2] she was terminated. As in *Holowecki*, this was enough for the EEOC to investigate her charge. Ms. Davis, a layperson, should not have her right to bring suit abolished because of a procedural pitfall.

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[2] Ms. Davis, a layperson, can only state reasons why she believes she was discriminated against. She cannot be expected to know Fort Bend County's actual motivations nor, as a layperson, come to a legal conclusion as to what the evidence may establish during a subsequent investigation. For further discussion, *see infra*, Section II.B.

II. AS A LAYPERSON INITIATED PROCEDURE, THE MAZE THAT IS TITLE VII'S EEOC ADMINISTRATIVE PROCESS SHOULD BE INTERPRETED AS FLEXIBLE AND NON-TECHNICAL.

The EEOC's administrative process for accessing Title VII relief is too complex to be interpreted as a strict jurisdictional requirement. The steps necessary for relief "must be accessible to individuals who have no detailed knowledge of the relevant statutory mechanisms and agency processes." *Holowecki*, 552 U.S. at 403; *see also Egelston v. State Univ. Coll. at Geneseo*, 535 F.2d 752, 754 (2d Cir. 1976) ("Title VII is rife with procedural requirements which are sufficiently labyrinthine to baffle the most experienced attorney, yet [their] enforcement mechanisms are usually triggered by laymen."). This Court has ruled that "Title VII [] is a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 124 (1988); *see also Love v. Pullman Co.*, 404 U.S. 522, 527 (1972) ("Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."); *Zipes*, 455 U.S. at 397 (applying identical reasoning).

Laypersons begin this complex process while the EEOC and the courts are tasked with its completion. While filing the initial charge form may be simple, courts reviewing these claims consistently find that the entire process is confusing and complex. *See Voutsis v. Union Carbide Corp.*, 452 F.2d 889, 892 (2d

Cir. 1971) (stating that "the intent of Title VII is remedial and that plaintiffs under it should not be held accountable for a procedural prescience that would have made a Baron Parke happy or a Joseph Chitty proud[ ]"); *Antonopulos v. Aerojet-General Corp.*, 295 F. Supp. 1390, 1395 (E.D. Cal. 1968) (stating that "[t]his law is a remedial one, and the Congressional purpose would not be furthered by making . . . members of the working class who are generally without substantial higher education, dot every 'i' and cross every 't' on their way to the courthouse[ ]"). The EEOC chooses to investigate only after a layperson files a charge alleging discrimination. Therefore, courts should not be barred from considering meritorious claims of discrimination because the employee did not "dot every 'i' and cross every 't'" in the initial charge form.

The Supreme Court categorizes statutory filing procedures as nontechnical, and notes that "[s]uch technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love*, 404 U.S. at 527. This Court most recently explicitly recognized that:

> Documents filed by an employee with the EEOC should be construed, to the extent consistent with permissible rules of interpretation, to protect the employee's rights and statutory remedies. Construing ambiguities against the drafter may be the more efficient rule to encourage precise expression in other contexts; here, however, the rule would

> undermine the remedial scheme Congress adopted. It would encourage individuals to avoid filing errors by retaining counsel, increasing both the cost and likelihood of litigation.

Holowecki, 552 U.S. at 406 (2008).

In light of Title VII's complex procedural obligations, which are initiated by, and meant to protect, laypersons, the information on an initial charge form cannot be used as an bar to justice. The charge form requires the layperson to conclude the reason for the harm done without first knowing the employer's motivation. Instead, the most important part of a layperson's charge of discrimination are the factual allegations made, not the layperson's ability to successfully guess the legal conclusion before an investigation even occurs. To cut off an employee's right to bring an antidiscrimination suit because he or she incorrectly guessed the legal conclusion underlying the discriminatory actions would be unduly harsh and undermine the purposes of Title VII.

A. Processing an employment discrimination charge with the EEOC is an intricate and complex process that is initiated by laypersons, not lawyers.

The EEOC's administrative process for reaching an ultimate determination on a charge is a complex and elaborate undertaking that begins when an aggrieved employee files a charge of employment

discrimination with the appropriate state and federal authorities. Employees typically navigate the state and federal administrative processes without the aid of legal counsel or a clear understanding of the relationship between the claim filing process and subsequent lawsuit. Because Fort Bend County and its amici curiae boast of the clarity and simplicity of the EEOC's process for investigating a claim, it is important to understand this process and the administrative complexity involved. To be clear, it is not the actual filing of a discrimination charge with the EEOC that clouds a layperson's understanding of this process—an employee can easily fill out a charge form and file the charge with the Commission—it is the employee's ignorance of the EEOC's process that compels a layperson's reliance on the Commission to properly investigate the charge and reach an appropriate determination.

The EEOC is tasked with the broad authority of investigating and attempting to conciliate violations of various federal antidiscrimination laws, which include: Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act of 1990, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1963, the Rehabilitation Act of 1973, and the Genetic Information Nondiscrimination Act of 2008. 42 U.S.C. §§ 2000e-4(g), 2000e-5(a); 29 C.F.R. § 1601.1 (2019). The Commission begins its investigative process when an employee files a charge with the EEOC alleging an employer "has engaged in an unlawful practice." 42 U.S.C. § 2000e-5(b); 29 C.F.R.

§ 1601.13 (2019). Alternatively, if an employee resides in a jurisdiction with applicable state and local anti-discrimination laws, then generally, the employee must first file the discrimination charge with the local Fair Employment Practice agency ("FEP") before the EEOC can exercise its federal jurisdiction over the complaint. 29 C.F.R. § 1601.13. Because federal and state antidiscrimination laws have concurrent jurisdiction over claims of employment discrimination, section 706(c) of Title VII directs the EEOC to allow state and local authorities the exclusive right to process claims of discrimination for a period of sixty days. 42 U.S.C. § 2000e-5(b). The EEOC applies this deference policy through work-sharing agreements with FEP agencies and exercises its jurisdiction over a charge after sixty days from when the FEP agency received the charge or once the FEP agency has concluded its investigation. 42 U.S.C. § 2000e-5(c) to (d); 29 C.F.R. § 1601.13.

Because this claim filing process is usually initiated by laypersons without the assistance of legal counsel, the EEOC does not require the complaining party to identify all potential forms of discrimination in the initial charge. 29 C.F.R. § 1601.12 (2019). For the EEOC to begin its investigation, the charge must simply state an employer's identifiable violation of Title VII. *Id.* The EEOC will generally not dismiss a charge so long as the charge is "sufficiently precise to identify the parties, and to describe generally the action or practices complained of." *Id.* Once the EEOC determines the charges fall within the scope of its

authority, the Equal Opportunity Specialist investigates the factual allegations to determine whether there is reasonable cause to "believe the charge is true[.]" 42 U.S.C. § 2000e-5(b). The EEOC has broad power to investigate any discrimination on the part of the employer related to the factual allegations in the charge form. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68 (1984) (stating that, "Since the enactment of Title VII, courts have generously construed the term 'relevant' and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer."). After the investigation is completed, the EEOC will either dismiss the charge or will attempt to resolve the issue through informal means of "conference, conciliation, and persuasion" if it finds reasonable cause. 42 U.S.C. § 2000e-5(b).

Regardless of the results of the EEOC's investigation, the Commission issues a right to sue letter in every case, unless the Commission has been otherwise successful in resolving the dispute. The EEOC issues a right to sue letter: (1) when, during the administrative investigation, the aggrieved party requests in writing that a notice of right to sue be issued; and (2) after the EEOC has made a determination on the charge. 29 C.F.R. § 1601.28(a)-(b) (2019). Essentially, the EEOC recognizes an employee's right to move forward with a discrimination claim in court and attempts to facilitate this action by issuing a right to sue letter upon the conclusion of its investigation.

The EEOC's investigative process and its ultimate determination of reasonable cause—or the lack

thereof—should not preclude an aggrieved employee from moving forward with litigation. Because the EEOC's charge filing process is intended to help laypersons investigate allegations of workplace discrimination, the process should not be used in a way that extinguishes an employee's right to file a claim in court.

B. Requiring laypersons to make legal conclusions when checking the boxes on an EEOC charge form at the outset of an investigation is unreasonable and stringent.

The heart of Fort Bend County's argument is that Ms. Davis failed to check the right box at the outset of the EEOC administrative proceeding. Pet'r's Br. 8. Fort Bend County argues for a rule that would require laypersons to guess the correct legal conclusion prior to any fact gathering. Adopting such a rule would place an unreasonable burden on those who believe they have experienced workplace discrimination. *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462-63 (5th Cir. 1970). The "crucial element[s]" of an EEOC charge are the underlying factual allegations, not the boxes checked on a simple form at the outset of an investigation. *Id.* at 462. "[T]he only procedural requirement which should confront a Title VII complainant is the requirement that he state . . . *facts* sufficient to trigger a Commission investigation." *Id.* (emphasis original).

The Fifth Circuit explained in *Sanchez* that there could be many reasons why an aggrieved party fails to check the "correct" boxes on an EEOC form and that "none of [these reasons] should cut off the charging party's rights." *Id.* The Fifth Circuit further reasoned that checking the box at the outset of a proceeding is merely a legal conclusion, and to cut off a party's rights simply because they failed to assume the correct legal conclusion is "inconceivable." *Id.* The filing of a charge triggers the EEOC's investigatory powers, and at the time of filing, the charging party may only know limited facts surrounding the discriminatory treatment. Although the charging party "may have precise knowledge of the facts concerning the 'unfair thing' done to him, [he may] not be fully aware of the employer's motivation for perpetrating the 'unfair thing.'" *Id.* In fact, an employer may not provide an explanation for the action, leaving the true reason for the "unfair thing" unknown to the employee until the employee files a complaint in federal district court, leading to discovery.

Further, the EEOC may uncover additional, previously unknown discriminatory reasons for the adverse employment action that were not included in the original charge. The original charge simply provides the EEOC with "a jurisdictional springboard to investigate whether the employer is engaged in any discriminatory practices." *EEOC v. Huttig Sash & Door Co.*, 511 F.2d 453, 455 (5th Cir. 1975). Essentially, Fort Bend County argues that because Ms. Davis did not have the psychic ability to predict the correct magic words to

capture all the possible bases that may have been a reason for her termination in her initial charge form, that her religious discrimination claim should be precluded. Pet'r's Br. at 54-55. Should this Court adopt this position, an aggrieved employee would be encouraged to make protective filings by checking all possible boxes to ensure they do not lose their right to bring a suit on a claim. Alternatively, an uncertain employee may just leave all boxes on the form unchecked out of fear of ruining their chances to bring their claim to court.

Clearly, EEOC's charge filing process and accompanying procedural obligations within Title VII are far from simple. Its complexity is overwhelming to navigate for laypersons victimized by workplace discrimination. These processes should be construed as nontechnical so that laypersons who have experienced workplace discrimination are not barred from seeking justice because of a technical omission during this process.

III. A WAIVABLE ADMINISTRATIVE EXHAUSTION DEFENSE SERVES THE PUBLIC INTEREST OF EFFECTIVELY ELIMINATING DISCRIMINATION IN THE WORKPLACE.

The public and the courts have an interest in efficiently resolving employment discrimination claims. In fact, the public's desire for timely resolutions of employment discrimination cases is fueled by the remedial nature of statutes such as Title VII.

Administrative processes are meant to promote efficiency by allowing certain forfeitures, waivers, and adaptions when justice dictates to better service victims of discrimination and preserve judicial resources. In contrast, a strict jurisdictional requirement of an administrative process would hinder procedural efficiency by providing employers with excuses for delay. Further, administrative exhaustion as a waivable defense would provide necessary remedy for disadvantaged victims of employment discrimination without increasing filing of frivolous lawsuits or allowing bad faith filers to act without penalty. Congress explicitly worked to eliminate employment discrimination through legislation such as Title VII, the primary intent of which is not to create "an integrated scheme of administrative and judicial review" hindering filers, as Fort Bend suggests, but rather to provide a remedy for victims of employment discrimination. Pet'r's Br. 23. Administrative exhaustion as a waivable defense furthers this remedial intent.

A. Flexible administrative exhaustion serves the public interest of judicial efficiency and furthers Congressional intent to eradicate discrimination.

Fort Bend County acknowledges that "Title VII's exhaustion requirement promotes judicial efficiency by facilitating voluntary resolution of claims." Pet'r's Br. 47. However, Fort Bend County's stringent jurisdictional approach defeats this goal of efficiency. If an administrative exhaustion objection can be held as a last

resort, employers like Fort Bend County can waste judicial time and resources. In a flexible approach, an employer can still raise exhaustion claims, provided they are timely.

Contrary to Fort Bend County's position, employees are not eager to file claims of discrimination in federal court instead of working with the EEOC. Pet'r's Br. 28 (stating that, "allowing employees to circumvent the administrative process would undermine Congress's objective of encouraging non-judicial resolution of employment discrimination claims"). Many employees lack the resources to engage in costly litigation and there is no indication that there has been an increase in meritless claims in those circuits which have held that these claim processing requirements are not jurisdictional. A flexible administrative exhaustion procedure allows the courts to efficiently process claims of discrimination and effectively eliminate discrimination from the workplace.

1. Finding administrative exhaustion to be jurisdictional incentivizes employers to delay raising administrative objections and waste judicial resources.

A main purpose of administrative exhaustion is to promote efficiency. *Woodford v. Ngo*, 548 U.S. 81, 88 (2006). Title VII incorporates an administrative process to promote prompt resolution of discrimination claims. Treating these processes as jurisdictional

obstructs this goal because a claim against jurisdiction "can never be forfeited or waived." *Arbaugh*, at 514. Consequently, an employer could raise a jurisdictional exhaustion claim at any stage of litigation, "even after trial and the entry of judgment." *Id.* at 506. Although "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction," the Court has "tried in recent cases to bring some discipline to the use of this term." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). In *Henderson*, the Court noted that among the rules inappropriately "branded" jurisdictional are claim processing rules designed to "promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Id.* Title VII's administrative requirement is designed to promote orderly progress of discrimination claims and this efficient design warrants against the jurisdictional label.

Without the threat of waiver, employers are free to save administrative exhaustion defenses until after they take their chances at trial. As Fort Bend County's counsel recognizes, expecting an employer to bring an administrative exhaustion defense is "akin to trusting the fox to guard the hens." Pet'r's Br. 30. "For purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be raised at particular times." *Henderson*, 562 U.S. at 434. The waste and unfairness that results when an employer is allowed to use an affirmative defense to dodge an unfavorable verdict is evident. If a party successfully

asserts a lack of jurisdiction after trial ends, "many months of work on the part of the attorneys and the court may be wasted." *Id.* Knowing the claim cannot be waived, an employer has no incentive to raise the argument before court resources have been spent. This ploy to delay accountability and waste resources was apparent to the Court in *Arbaugh* and it is clear from the facts of the present case.

The Court in *Arbaugh* was critical of the employer who waited to assert a jurisdictional argument until after it lost at trial. The Court highlighted how the employer was able to "try the case for two days and then assert a lack of subject matter jurisdiction in response to an adverse jury verdict." *Arbaugh*, 546 U.S. at 515. The Court held that the Title VII employee-numerosity requirement was not jurisdictional and "could not be raised defensively late in the lawsuit, i.e., after Y & H had failed to assert the objection prior to the close of trial on the merits." *Id.* at 504. The Court reasoned that "[g]iven the unfairness and waste of judicial resources entailed in tying the employee-numerosity requirement to subject-matter jurisdiction," the requirement was not jurisdictional. *Id.* at 502. The jurisdictional construction Fort Bend County asks this Court to adopt encourages employers to use the exhaustion defense in the same way the employer in *Arbaugh* raised its defense—as a safeguard to an unfavorable ruling.

Here, the waste of resources is exacerbated by Fort Bend County's failure to raise the exhaustion defense for five years. The Fifth Circuit discussed the unreasonable delay in Fort Bend's exhaustion defense

during the second appeal. "Simply put, Fort Bend waited five years and an entire round of appeals all the way to the Supreme Court before it argued that Davis failed to exhaust." *Davis v. Fort Bend County*, 893 F.3d 300, 307 (5th Cir. 2018). Fort Bend County missed the chance to make this claim and should not be allowed to erase five years of unfavorable appeals in a last-ditch effort to evade liability. Without a waiver component, employers have no incentive to raise administrative exhaustion defenses in a timely manner. Surely, when Congress added an administrative component to Title VII to promote efficiency, it did not intend to equip employers with the tools to waste resources in an effort to sidestep liability.

2. Contrary to Fort Bend County's unsupported assertions, a waivable administrative exhaustion defense will not lead to an influx of frivolous lawsuits in federal court.

Fort Bend County suggests, without foundation, that employees will "skip the administrative process and go straight to federal court" absent a strict jurisdictional bar. Pet'r's Br. 26. They offer no data or facts to support this "the sky will fall" argument. In fact, Fort Bend County's argument ignores the stark reality faced by victims of employment discrimination. These victims are often consumed with finding meaningful employment after a devastating termination or rejection for promotion and are wholly uninterested in spending years in federal litigation. The Court has

found several of EEOC's procedural filing provisions to be not jurisdictional, *see* cases cited *supra* p. 5-7, yet Fort Bend County cannot point to a corresponding flood of litigation in district courts in response. This Court should not be swayed by Fort Bend County's empty threat of increased litigation, because employees have every incentive to instead exhaust claims of discrimination with the EEOC.

A waivable administrative exhaustion process will not create an influx of frivolous lawsuits in federal courts because Title VII's administrative process benefits employees. "Statutes requiring exhaustion serve a purpose when a significant number of aggrieved parties, if given the choice, would not voluntarily exhaust." *Woodford*, 548 U.S. at 89 (discussing the advantages of administrative review). Under Title VII, employees are motivated to voluntarily exhaust administrative options because it is cheaper, faster, and hopefully the most effective way to move forward. Employment litigation is expensive and "[t]he cost of litigating such claims is beyond the means of the average employee and an even greater hurdle for the discharged employee with substantially reduced income." Ann C. Hodges, The Limits of Multiple Rights and Remedies: A Call for Revisiting the Law of the Workplace, 22 Hofstra Lab. & Emp. L.J. 601, 609 (2005). Many employees lack the resources necessary to hire an attorney, resulting in 19% of employment discrimination cases from 1998-2017 being litigated pro se. Mitchell Levy, Empirical Patterns of Pro Se Litigation in Federal District Courts, 85 U. Chi. L. Rev. 1819, 1841

(2018). Even when employees are able to secure "expensive and often elusive legal representation . . . [e]mpirical studies of employment law claims show that plaintiffs have limited success at every level of the process." Hodges, *supra* at 611.

However, when an employee files with the EEOC, the EEOC works to eliminate the discriminatory practice through "informal methods of conference, conciliation, and persuasion." *Mach Mining, LLC v. E.E.O.C.*, 135 S.Ct. 1645, 1651 (2015). The EEOC's considerable power in these cooperative measures means charges of discrimination will be "resolved much more quickly and economically in proceedings before an agency than in litigation in federal court." *Woodford*, 548 U.S. at 89. Further, "even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration." *Id.* When the EEOC investigates a charge, the employer is required to articulate a reason for its actions and this record can be useful for employees as evidence in later discovery or to decide whether a case should be pursued if it survives administrative review. Because of these advantages, "some aggrieved parties will voluntarily exhaust all avenues of administrative review before resorting to federal court, and for these parties an exhaustion requirement is obviously unnecessary." *Id.* Considering the disparity in resources between victims and their employer, employees have every incentive to work with the

EEOC in hopes of reaching a cost-effective agreement before proceeding directly to costly litigation.[3]

There is no indication that a waivable administrative exhaustion process will lead to an influx in frivolous lawsuits by victims of employment discrimination. Nevertheless, if Fort Bend County is still concerned about protecting employers from unnecessary or premature litigation, further remedy is found in Title VII's explicit instruction that "the court may, in its discretion, stay further proceedings for . . . further efforts of the Commission to obtain voluntary compliance." 42 U.S.C. § 2000e-5(f)(1). A stay effectively empowers the EEOC's role in enforcing Title VII by providing the EEOC with necessary autonomy during their investigation. A stay also effectively relieves employees by providing a work environment free of unlawful discrimination. Employers are in no way prejudiced by adopting Ms. Davis's interpretation of Title VII's administrative exhaustion process because the employer

[3] Should an employee deliberately skirt the EEOC, the courts are not without recourse. Rule 11 requires the party bringing a claim to certify that: (1) to the best of its knowledge, the claim is not brought for an improper purpose, such as harassment; (2) there is a valid basis for the claim; and (3) that factual contentions have or will have evidentiary support. Fed. R. Civ. P. 11(b). Therefore, if the court finds that Rule 11 has been violated, the court may impose a sanction on the violating party. Fed. R. Civ. P. 11(c). The court also has discretion to award a defendant attorney's fees in the case that Title VII litigation is brought in a manner that is "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith," *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421 (1978). These discretionary measures will continue to deter frivolous litigation under a flexible administrative exhaustion process.

never loses the ability to object. If an issue arises where the procedural process has not been complied with, the courts have the power to grant a stay and further address the issue.

Fort Bend County's harsh jurisdictional approach inappropriately suggests the court's only option to ensure use of Congress's "preferred means" of cooperation and voluntary compliance is to dismiss an unexhausted allegation. Pet'r's Br. 28. This mandate not only disregards the court's power to stay the proceedings but also the court's power to order the EEOC to conciliate. If an employer presents "credible evidence" to the court that the EEOC did not "provide the requisite information about the charge or attempt to engage in discussion about conciliating the claim . . . the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance." *Mach Mining*, 135 S.Ct. at 1656. Fort Bend County offers no explanation of how the court's power to stay the proceedings and order conciliation will be insufficient to allow the opportunity for voluntary compliance when an employer asserts a timely exhaustion defense.

Fort Bend County's claim that employees will circumvent the EEOC also overlooks that many Title VII claims "necessarily overlap" with 42 U.S.C. § 1981. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 455 (2008). Section 1981 provides that "[a]ll persons . . . shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens[.]" 42 U.S.C. § 1981(a). While both

statutes provide independent remedies for intentional discrimination, "Title VII requires that those who invoke its remedial powers satisfy certain procedural and administrative requirements that § 1981 does not contain." *Humphries*, 553 U.S. at 455. Even though § 1981 has no administrative procedure, Fort Bend County cannot point to a rush of employees using § 1981 claims to circumvent the EEOC and bring claims of employment discrimination directly to federal court, likely because "Title VII provides important administrative remedies and other benefits that § 1981 lacks." *Id.* Because of the benefits of the administrative review process, employees will continue to bring allegations of discrimination to the EEOC.

The rigid jurisdictional approach suggested by Fort Bend County only helps employers delay responsibility of diligent litigation. Contrary to Fort Bend County's assertion that the "sky will fall" if this Court holds administrative exhaustion to be a waivable defense, there is little reason for victims of discrimination to circumvent the EEOC. Employees face a significant disadvantage accusing an employer of discrimination and prefer to utilize EEOC's expertise to settle these claims. Thus, a waivable administrative exhaustion defense best serves the public interest in effective eradication of discrimination from the workplace.

B. Continuing to treat EEOC procedures with flexibility furthers Congress's primary goal of eliminating workplace discrimination.

In passing Title VII, Congress recognized the ultimate significance of ending discrimination in the workplace. Congress believed that the persistence of discrimination in the workplace had the ability to preclude individuals from participating in various facets of life. As stated in the legislative history of Title VII:

> [T]he right to vote, however, does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed to the graduate. The opportunity to enter into a restaurant or hotel is shallow victory where one's pockets are empty. The principle of equal treatment under the law can have little meaning if in practice its benefits are denied.

H.R. REP. NO. 88-194, at 2516 (1964) as reprinted in 1964 U.S.C.C.A.N. 2391, 1963. The Supreme Court, addressing the issue of employment discrimination in various cases, emphasized the primary purpose of Title VII. *See Franks v. Bowman Transp. Co. Inc.*, 424 U.S. 747, 763 (1976) ("[I]n enacting Title VII . . . Congress intended to prohibit practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin and ordained that its policy of outlawing such discrimination should have the highest priority."); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801

(1973) ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications."). In the face of these strong expressions of purpose, it is hard to envision Congress intended victims of discrimination to lose their right to pursue claims in federal court simply because they failed to check a box on an EEOC form. Yet, that is precisely what Fort Bend County asks this Court to do by arguing that these procedural technicalities should be treated as jurisdictional bars.

Downplaying the elimination of workplace discrimination as the primary congressional goal of Title VII, Fort Bend County argues that Congress's main goal was to create "an integrated scheme of administrative and judicial review," which requires that charges of discrimination be brought before the EEOC first and later to the courts if the EEOC is unable to resolve the claim. Pet'r's Br. 23-24. Fort Bend County goes on to argue that "the text, structure, and purpose of Title VII make it abundantly clear that Congress intended to grant courts jurisdiction only over claims that have been brought before the EEOC." Pet'r's Br. 18.[4] Certainly, it is possible that one of the purposes of Title VII was to adopt "an integrated scheme of

[4] It is important to note that Davis did bring her claims of sex discrimination and retaliation before the EEOC and allowed for investigation. After her initial complaint with the EEOC, Davis submitted an amended questionnaire, which included the word "religion" next to the checklist labelled "Employment Harms or Actions." *See* J.A. 90.

administrative and judicial review." Pet'r's Br. 23. However, that objective cannot override the ultimate purpose of Title VII, which is the elimination of discrimination in the workplace.

Given Title VII's primary purpose of ending workplace discrimination, Title VII is remedial in nature. *See Pullman-Standard v. Swint*, 456 U.S. 273, 276 (1982) ("Title VII is a broad remedial measure, designed to assure equality of employment opportunities."). Based on the remedial nature of Title VII, this Court has avoided making technical constructions. *See International Broth. of Teamsters v. U.S.*, 431 U.S. 324, 381 (1977) (reasoning that because Title VII was a remedial statute intended to eliminate invidious employment practices it should "be given liberal interpretation and exemptions from its sweep should be narrowed"); *Washington County v. Gunther*, 452 U.S. 161, 178 (1981) (reasoning that the Court should "avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate").

Despite the explicit directive from this Court to reject over-technical constructions of Title VII, Fort Bend County argues that this Court should construe Title VII strictly based on conclusions implicitly drawn from cases unrelated to Title VII. Pet'r's Br. 18-21. However, this would be directly in conflict with cases that have already clearly established that Title VII is a remedial statute which should be construed liberally in order to give effect to the main congressional goal of ending workplace discrimination. The obvious necessity in

avoiding hyper-technical interpretations of Title VII is especially evident in this case. If this Court were to accept Fort Bend County's arguments, Ms. Davis, as a victim of discrimination would be punished for failing to check a box and the discrimination Congress sought to remedy under Title VII would go unaddressed. Therefore, in determining how to interpret Title VII's exhaustion requirement, this Court should fully consider the purpose and nature of Title VII in order to achieve the goals intended by Congress.

CONCLUSION

Title VII's administrative exhaustion requirement is a waivable claim processing rule meant to guide unsophisticated victims of discrimination through the legal terrain of filing a complaint under Title VII. Strictly requiring administrative exhaustion as a jurisdictional prerequisite to suit would only create unnecessary obstacles for victims of discrimination seeking relief. There is no reason to believe a waivable administrative exhaustion requirement would lead to an increase of potentially frivolous Title VII claims in federal courts. Beyond the EEOC's responsibility to conciliate claims presented to them is the responsibility to provide an effective remedy for victims of discrimination in the workplace. Therefore, a hyper-technical process goes against Congressional intent by unduly burdening the laypersons initiating the Title VII investigations. Relying on "[t]he structure of Title VII, the congressional policy underlying it, and the

reasoning of [this Court's] cases," this Court should hold that Title VII's procedural processing rules are "not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." *Zipes*, 455 U.S. at 393.

Respectfully submitted on April 3, 2019,

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